Office-Supreme Court, U.S.
FILED
SEP 4 1981
ALEXANDER L. STEVAS,
CLERK

81-469

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. BUSH,
Petitioner

v.

WILLIAM R. LUCAS,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM HARVEY ELROD, JR.
205 Holly St., N.E.
Decatur, AL 35601
(Tel. No. 205-3553731)
Attorney for Petitioner

September 4, 1981

O. Davis Enterprises, 2115 Whitesburg Drive, S.E.
Huntsville, AL 35801

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. BUSH,
Petitioner

v.

WILLIAM R. LUCAS,
Respondent[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner William C. Bush prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit as rendered in this case on remand

---

[1] This caption contains the names of all parties to the proceeding in the courts below.

pursuant to prior grant of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Does a plaintiff's status as a civilian employee of the federal government preclude a *Bivens*-type suit by such plaintiff personally against another federal civilian employee personally, for such defendant's alleged violations of that plaintiff's First or Fifth Amendment rights in course of that defendant's procuring of that plaintiff's demotion?

2. Does administrative relief with respect to such demotion, *qua* personnel action, pre-empt a *Bivens*-type suit by the improperly demoted employee, as an individual person, against the individual person who, while purporting to act in his official executive position, allegedly conspired with others to procure the demotion in retaliation for the plaintiff's public-

ly commenting upon personnel and management practices at the governmental facility where both parties were employed and which the defendant headed?

TABLE OF CONTENTS

Page

Petition for Writ.....1

Questions Presented.....2

Table of Contents.....3

Table of Authorites.....4

Opinions Below.....8

Jurisdiction of this Court.....8

Constitutional Provisions, Statutes and Regulations Involved.....9

Statement of the Case.....10

Reasons for Granting the Writ...20

To Settle Important Questions of Federal Law.....20

To Resolve An Emerging Conflict Among the Courts of Appeal.....31

Page

Conclusion.....35

Appendix A.....a-1

Appendix B.....b-1

Appendix C.....
Appendix D.....
Appendix E.....
Appendix F.....
Appendix G.....
Appendix H.....
Appendix I.....
Appendix J.....

BOUND SEPARATELY

TABLE OF AUTHORITIES

Cases:

Barr v. Matteo, 360 U.S. 564 (1959)..15, 27

Bishop v. Tice, 622 F. 2d 349 (8th Cir. 1980).....*passim*

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).....*passim*

Branti v. Finkel, 445, U.S. 507 (1980)...25

Page

Brown v. GSA, 425 U.S. 820 (1976) 30n

Bush v. Lucas, 598 F. 2d 958 (5th Cir. 1979) *vacated and remanded*, 446 U.S. 914, 100 S. Ct. 1846, 64 L. Ed. 2d 268 (1980).....17, 18, 19

Bush v. Lucas, 647 F. 2d 573 (5th B Cir. 1981).....*passim*

Butz v. Economou, 438 U.S. 478 (1978).*passim*

Carlson v. Green, 446 U.S. 14 (1980)..*passim*

Davis v. Passman, 442 U.S. 228 (1979).*passim*

Elrod v. Burns, 427 U.S. 347 (1976).....25

Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967).....25

Perry v. Sinderman, 408 U.S. 593 (1972)..25

Pickering v. Board of Education, 391 U.S. 563 (1968) 13, 13n

Slochower v. Board of Ed. of N. Y., 350 U.S. 551 (1955).....25

Sonntag v. Dooley, 650 F. 2d 904 (7th Cir. 1981).....30n, 32, 33

Weiman v. Updegraff, 344 U.S. 183 (1952).....25

Page

Constitutional Provisions:

Art. III, §2, cl. 1, U. S. CONST.....9

Amend. I, U. S. CONST....2, 9, 13, 14, 26

Amend, V, U. S. CONST.....2, 9, 26, 28n

Statutes:

5 U. S. C. § 1301.....9

5 U. S. C. § 3302.....9

5 U. S. C. § 5596.....9

5 U. S. C. § 7511.....9

5 U. S. C. § 7701.....9

28 U. S. C. § 1254(1).....9

28 U. S. C. § 1331.....9

28 U. S. C. § 1442(a)(1).....9, 14

28 U. S. C. § 1446.....9

Tit. 7 § 26, Ala. Code 1940.....13n

Tit. 7 § 6-2-39, Ala. Code 1975.....13n

Regulations:

5 C.F.R. Part 752.....9

5 C.F.R. Part 772.....9

Page

Rules:

Civil Service Rule 5.1 Exec. Ord. No. 10577, 19 Fed. Reg. 7521 (1956)....9

Briefs and Petitions:

Brief for Respondent, *Bush v. Lucas*, 446 U.S. 914.....21n

Petition for a Writ of Certiorari, *Bush v. Lucas*, 446 U.S. 914...8, 8n, 21n

Petition for Rehearing and Suggestion of Rehearing *en banc*, *Sonntag v. Dooley*, No. 80-2435, 7th Cir. 1981....34

Plaintiff's Opposition to Motion to Dismiss Individual Defendants, *Mundy v. Brown*, No. 80-2096, D.C. Dist. 1980.....30n

Supplemental Brief for Appellee, *Bush v. Lucas*, 647 F. 2d 573 (5th Cir. 1981).....29n

OPINIONS BELOW

The court of appeals' opinion (App. A hereto, a-1---a-12) on remand[2] appears at 647 F. 2d 573. That court's original opinion (App. C, c1-1---c1-14) appears at 598 F. 2d 958. A copy of the district court's unpublished memorandum of opinion appears at pp. d-2---d-17 of Appendix D hereto.

JURISDICTION OF THIS COURT

The court of appeals' judgment on remand bears date of 12 June 1981. It was entered on that day. The present petitioner (whom we hereinafter call "Bush")[3] did

---

[2] On 28 April 1980, this Court granted Bush's first petition for certiorari in this case, vacated the original judgment of the Court of Appeals for the Fifth Circuit, and remanded the case to that court "for further consideration in light of *Carlson v. Green....*" *Bush v. Lucas*, 446 U.S. 914, 100 S. Ct. 1846, 64 L. Ed. 2d 268, *vacating* 598 F. 2d 958 (5th Cir. 1979); and see Appendix B hereto.

[3] We likewise hereinafter call the respondent by his surname, "Lucas."

not apply for rehearing. Bush invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

This case involves the following constitutional provisions, statutes, rules and regulations the relevant parts of which are set forth in Appendix H hereto:

Art. III, § 2, cl. 1, U. S. CONST.;

Amend. I, U. S. CONST.;

Amend. V, U. S. CONST.;

5 U. S. C. §§ 1301, 3302, 5596, 7511, 7701;

28 U. S. C. §§ 1331, 1442(a)(1), 1446;

Civil Service Rule 5.1 Exec. Ord. No. 10577, 19 Fed. Reg. 7521 (1956);

5 CFR §§ 752.101, 752.104, 752.202, 752.203, 752.401, 772.101, 772.102, 772.301, 772.305, 772.307, 772.308, 772.309, 772.310 and 772.312 (1975).

STATEMENT OF THE CASE

Both Bush and Lucas are career civilian employees of the United States Government. At all material times, Bush has been an aerospace engineer employed at the George C. Marshall Space Flight Center (hereinafter called "MSFC") and Lucas has been Director of that major field facility of the National Aeronautics and Space Administration (hereinafter called "NASA").

In course of a major reorganization in 1974, MSFC management assigned Bush to a new position. He found few if any actual duties corresponding to the description of the position. Intra-organizational efforts to induce MSFC management to change or abolish the position were unavailing. In separate appeals to the Civil Service Commission (hereinafter called the "CSC"), Bush assailed both the classification of the position and his assignment to the

position.

During the pendency of *those* administrative "appeals," in the spring of 1975, the media attributed several public statements to Bush to the effect that his job was a falsehood, a travesty and worthless; and that he was reporting what appeared to be a fraudulent use of federal funds. Some of the statements received national dissemination by way of a news release.

When certain media representatives asked Lucas, in late June of 1975, about Bush's statements, Lucas said:

> Mr. Bush has made certain statements to the effect that he does not have meaningful work to do. I have had that statement [*sic*] investigated and I can say, unequivocally, that such a statement has no basis in fact.

In August of 1975, MSFC management commenced an adverse action against Bush

for having made the public statements attributed to him. After Bush's written and personal answers to the notice of proposed adverse action, Lucas, as agency deciding official, reduced Bush two General Schedule grades in the civil service and assigned Bush to a different position at MSFC. Bush timely appealed the adverse decision to the CSC. The initial CSC decision (Appendix E hereto) sustained the agency action. On Bush's petition, however, the CSC's Appeals Review Board, as that body was called in July of 1978, rendered a decision (Appendix F hereto) reversing the initial CSC decision and recommending that Bush be restored retroactively "to his former position, grade and pay...." (App. F, f-26.) Applying a *Pickering*[4]-type balancing test, the Appeals Review Board based its decision upon a

---

[4] *Pickering v. Board of Education*, 391 U.S. 563 (1968)

perceived unjustifiable "abrogation of the exercise of free speech" (*ibid.*, f-25). After the Civil Service Commissioners dedenied (Appendix G hereto) NASA's petition to reopen the Appeals Review Board's decision, MSFC took the corrective action recommended by the Board.

Administrative review of Bush's reduction-in-grade lasted from December of 1975 until October of 1978. While such review was still pending at the first level of the CSC's appellate hierarchy, and on the day before an Alabama statute of limitations[5] might have barred the action, Bush sued Lucas individually in a state court. In that suit, Bush sought to recover damages for defamation (Complaint, Counts One through Three) and for conspiracy "to deprive...[Bush] of his constitu-

---

5 Tit. 7 § 26, Ala. Code 1940, as "Recompiled,"---now Subdivs. (4) and (5) of § 6-2-39, Ala. Code 1975, effective 31 Oct. 1977.

tional rights of freedom of speech and of petition to Congress and to reduce...[him in civil-service grade]..." (*ibid.*, Count Four, 1st of two ¶¶ numbered "2"). The defamation allegedly lay in the falsity, malice and publication of Lucas' utterance (*ante*, p.7) about one of Bush's prior statements' having "no basis in fact." The conspiracy allegedly lay in Lucas and his co-conspirators' conduct in having concocted and consummated the adverse personnel action against Bush in retaliation for the latter's having exercised his aforementioned First Amendment rights. (Complaint, Count Four, *passim*.)

Lucas timely removed the suit to the United States District Court for the Northern District of Alabama. Jurisdiction in that court rested on 28 U. S. C. § 1442 (a)(1), relating to the removal of actions begun in state courts against officers or agencies of the United States for acts

under color of office, etc.

After such removal of the suit, and without answering the complaint, Lucas moved alternatively for dismissal of the complaint or for summary judgment. Apart from the general ground of failure to state a claim upon which relief could be granted, Lucas rested his motion exclusively upon the doctrine of absolute executive immunity under *Barr v. Matteo*, 360 U. S. 564 (1959).

Before Bush responded to the Lucas motion, the Federal Employee Appeals Authority rendered the initial CSC decision (Appendix E hereto) on Bush's administrative appeal from MSFC's reducing him in grade. Lucas' counsel informally called that administrative ruling to the attention of the district court at some time prior to that court's ruling on the Lucas motion.

After completion of the limited dis-

covery permitted by the district court, and after supplementation of both the Lucas motion and the Bush response, the district court granted the motion for summary judgment. (App. D, d-1.) In a memorandum-opinion (App. D, d-2---d-17), the district court considered the defamation claim and the conspiracy claim discretely. Treating the former with no constitutional overtones or implications (*ibid.*, d-7, d-8), the district court regarded *Barr v. Matteo* as controlling (*ibid.*, d-4) on the point of Lucas' immunity to suit on that claim, as discretely considered.

While regarding the conspiracy claim as asserting violations of Bush's constitutional rights and as being "based on the seminal case of *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics*, 403 U. S. 388 (1971)..." (App. D, d-12), the dis-

trict court nevertheless concluded that the availability of administrative relief, albeit from the Government and not from Lucas (*ibid.*, d-15, n. 5), precluded Bush from maintaining suit against Lucas for "damages based," as the district court said, "on...[Bush's] demotion, allegedly contrived as a punishment for...[Bush's prior public] statements" (*ibid.*, d-16).

In affirming (598 F. 2d 958 [5th Cir. 1979]; Appendix C1 hereto) the judgment of the district court, the court of appeals substantially adopted the view of the district court. The court of appeals regarded this Court's intervening decisions in *Butz v. Economou*, 438 U. S. 478 (1978), and *Davis v. Passman*, 442 U. S. 228 (1979), and the intervening administrative restoration of Bush to his former grade, position and pay (App. F, f-25---f-26; App. G, g-3) as buttressing the district court's reasoning and ruling. The Fifth Circuit said

that it affirmed the district court

> [b]ecause *Butz v. Economou* affords the defendant immunity in the defamation part of this claim; and the rationale of *Davis v. Passman* forecloses a cause of action for damages under the circumstances of this case....
>
> (598 F. 2d at 959; Appendix C1 hereto, c1-4.)

When this case first reached this Court, on Bush's first petition for certiorari, the then Solicitor General suggested that this Court "hold... this case pending the disposition ...[of] *Carlson [v. Green]*." Brief for Respondent, at 7, *Bush v. Lucas*, 446 U. S. 914. On 22 April 1980, this Court decided *Carlson v. Green*, 446 U. S. 14. Six days later, this Court vacated the original judgment of the court of appeals in this case and remanded the case to that court "for further consider-

ation in light of *Carlson v. Green*, ..." *Bush v. Lucas*, supra, note 1.

On remand, that court of appeals has "conclude[d] that *Carlson* does not dictate a contrary result [to that attained upon the court of appeals' original consideration of Bush's appeal.]" (647 F. 2d at 575; App. A, p. a-2.) Accordingly, the court of appeals has reaffirmed the summary judgment for Lucas. (*Ibid.*) The court of appeals bases such reaffirmance upon: (1) the apparent absence of any impact by *Carlson* on the Fifth Circuit's prior holding with respect to Bush's defamation claim (647 F. 2d at 574; App. A, p. a-3); and (2) the proclaimed presence in this case of a "special factor counselling hesitation in the absence of affirmative action by Congress...." (647 F. 2d at 575, 576, 577; App. A, pp. a-4, a-5, a-6, a-11, a-12).

The Fifth Circuit finds such special factor in "the Government employer-employee

relationship present in this case." (647 F. 2d at 577; App. A, p. a-12.) The Fifth Circuit regards such finding as being "consistent with *Carlson*" (*ibid.*) and as serving to distinguish this case "from cases such as *Bivens* and *Carlson* which involved plaintiffs as private citizens seeking damages against agents of the Government acting in its sovereign capacity..." (647 F. 2d 577; App. A., p. a-10).

REASONS FOR GRANTING THE WRIT

1. To settle important questions of federal law.

The primary question in this case is whether a plaintiff's mere status as a civilian employee of the United States precludes his being accorded a *Bivens*-type remedy to recover damages for wrongs unconstitutionally consummated in the employment context and not fully redressed by the administrative remedies provided for correct-

ing wrongful personnel actions. A second question, professedly pretermitted (647 F. 2d 575, 577; App. A, pp. a-6, a-12) but perhaps only preserved by the court of appeals, is whether the administrative remedies pre-empt a *Bivens*-type claim for residual damages not covered by the administrative remedies.[6]

These are important questions. The

---

[6] This second question is substantially the same as Question No. 1 in Bush's prior petition for writ of certiorari, to obtain review of the Fifth Circuit's original decision affirming the district court's granting of Lucas' motion for summary judgment. *See* Petition for Writ of Certiorari at 3, *Bush v. Lucas*, 446 U.S. 914. That was one of the two questions which the government suggested "should be disposed of as appropriate in light of *Carlson v. Green*...," then under submission in this Court, *See* Brief for Respondent at 7--8, *Bush v. Lucas*, *supra*. Several features of the Fifth Circuit opinion presently sought to be brought under review militate against any sanguine assumption that that circuit necessarily would view *Carlson* as compelling the conclusion that the other, partial, remedies accorded Bush *by the government* do not pre-empt a *Bivens*-type claim by

approximately three million civilian employees of the federal government (Appendix I hereto) appear to us to be entitled to know, nationwide, whether, for constitutional deprivations sustained in the course

---

Bush against Lucas *personally*. First, the Fifth Circuit opinion of 12 June 1981 in this case reflects a very narrow, not to say grudging, reading of *Carlson*. Second, the Fifth Circuit opinion of 12 June 1981 stresses the negative, rather than the positive, features of *Carlson*; the Fifth Circuit opinion speaks more of what *Carlson* says about defeating a *Bivens*-type claim than of what *Carlson* says about the effectiveness of a *Bivens*-type remedy. Third, the Fifth Circuit opinion of 12 June 1981

> stress[es] the remedies made available by Congress to an aggrieved civil servant in order to emphasize the care Congress has taken to carefully balance the employee's rights as a citizen with the Government's interest in the efficient conduct of the nation's business.
>
> (647 F. 2d at 576--577; App. A, pp. a-9--a-10.)

Fourth, the Fifth Circuit opinion of 12 June 1981 embraces a gratuitous econium upon a postulated "comprehensive... scheme" (647 F. 2d at 577; App. A, p. a-10) of blended legislative and administrative personnel grievance procedures

of their employment, they may maintain *Bivens*-type damage suits in federal courts against federal functionaries who cause such deprivations.[7] Moreover, if "the

---

(647 F. 2d at 576; App. A, pp. a-8---a-10). Fifth, the author of that opinion would distinguish this case from *Bivens* and *Carlson* on the basis of the difference between a plaintiff who is a government employee and plaintiffs who "were private citizens seeking damages against agents of the Government acting in its sovereign capacity." (647 F. 2d at 577; App. A, p. a-10.) Sixth, in disregard of the fact that Bush has *not* bypassed his administrative remedies, the Fifth Circuit opinion of 12 June 1981 evokes the spectre of

> aggreived employees ... bypass[ing] the statutory and administrative remedies in order to seek direct judicial relief and thereby depriv[ing]... the Government of the opportunity to work out *its personnel* problems within the framework it has so painstakingly established.
>
> (647 F. 2d at 577; App. A, pp. a-10--a-11; italics ours.)

7 It may not be entirely captious to suggest that those three million federal civilian employees need to know whether our system of justice accords them qualitatively the same access to courts as it accords the approximately 26,000 prisoners currently incarcerated

unique relationship between the Federal Government and its civil service employees" (647 F. 2d at 576; App. A, p. a-6) per se justifies one court in debarring those employees from maintaining *Bivens*-type actions against federal functionaries, will it not also justify courts or successive Congresses---and whether under pleas of paramount public interest or under pleas of simple rationality---in future curtailment of hard-won constitutional protections for other interests of government employees than in maintaining particular types of suits against particular types of wrongdoers? The simplistic rationale which, for the Fifth Circuit, today justifies limitation of access to courts for redress of unconstitutional reprisals may tomorrow be used to justify

---

in federal correctional institutions (Appendix J hereto). Cf. *Carlson v. Green*, 446 U.S. at 18 et passim.

other debasement of governmental service. If such is to be the case, it should be so, we submit, as a matter of "principled choice" by *this* Court and not of expedient shift by any lower federal court.

In its tendency to make second-class citizens of civilian governmental employees, the Fifth Circuit opinion of 12 June 1981 runs counter to a course of almost three decades of constitutional adjudication which, overall, has expanded rather than contracted the body of constitutionally protected interests of government employees. *See, e. g., Wieman v. Updegraff,* 344 U.S. 183 (1952); *Slochower v. Board of Ed. of N. Y.,* 350 U.S. 551 (1955); *Keyishian v. Board of Regents of New York,* 385 U.S. 589 (1967); *Perry v. Sinderman,* 408 U.S. 593 (1972); *Elrod v. Burns,* 427 U.S. 347 (1976); and *Branti v. Finkel,* 445 U.S. 507 (1980.)

Although those cases involve state or local employees rather than federal employees, the difference between employers is not sufficient, we submit, to justify a jettisoning in this case of fundamental principles permeating those cases.

One of those fundamental principles, albeit one not uniformly articulated, is that the dignity of the individual person is a value of continuing vitality in an evermore monolithic milieu. It is a constitutional value. It is the value underlying much of the Bill of Rights. Is that fundamental value to be compromised to preclude a *Bivens*-type action by one individual person who happens to be a civilian employee of the federal government against another individual person who also happens to be a civilian employee of the federal government? If such a compromise is to be sanctioned, under the name of "accomodation" or otherwise, should it

not be only after full reflection by the Court which decided *Bivens*, *Butz*, *Davis* and *Carlson*?

Similarly, if, notwithstanding *Butz*, absolute executive immunity is in effect to be restored in instances where *Bivens*-type plaintiffs suffer from the postulated disability of being federal civilian employees, should not such qualification of *Butz* be first considered by the Court which decided *Butz*, rather than by courts at a tier which for years made a shibboleth of the plurality decision in *Barr v. Matteo*, 360 U.S. 564 (1959), for which practice *Butz* provided a long overdue corrective?

Finally, the once-and-prospectively-future aberrations of the Fifth Circuit[9] and the resultant confusions of the Eighth

---

[9] Please *compare* the Fifth Circuit opinion on original deliverance in this

Circuit[10] on the question of the postu-- lated pre-emptive effect of administrative remedies cry out for correction before the Department of Justice, in the perhaps not always congenial task of defending federal functionaries in *Bivens*-

---

case, 598 F. 2d at 961, App. C1, pp. C1-11---C1-14, *rehearing denied mem.*, 605 F. 2d 554, App. C4, pp. C4-1--C4-2, *with* the features of the Fifth Circuit opinion on remand which are mentioned in n. 6, *supra*.

10 In its overall somewhat ambivalent opinion in *Bishop v. Tice*, 622 F. 2d 350 (1980), the Eighth Circuit, while according the appellant former government employee a remedy, even a damage remedy under the Fifth Amendment (522 F. 2d 357), declined to derive such remedy from *Bivens* through *Davis* and *Carlson*. In support of its conclusion that the CSC remedies of re-instatement and back-pay obviated a *Bivens*-type remedy (622 F. 2d at 356--357) and, in fact, "constitute[d]...a 'special factor counseling hesitation' in the creation of a constitutionally based remedy for a wrongful dismissal..." (622 F. 2d at 357), the Eighth Circuit both cited the Fifth Circuit opinion on original deliverance in the case at bar (together with its subsequent history of being vacated and remanded, etc.) and, in a

type suits, further disseminates[11] the errors descended from the trial court's and the Fifth Circuit's initial de-constitutionalization of Bush's *Bivens*-type claim by according pre-emptive force to the CSC remedies available to him.

---

footnote, said that it, the Eighth Circuit, had "examined *Carlson v. Green* ... and ...[found] it consistent with ...[the Eighth Circuit's] result [in *Bishop v. Tice*]." (622 F. 2d at 357 n. (6.) Perhaps the key word in the footnote was "result."

11 On remand of the case at bar, the Department of Justice filed a supplemental brief in which it urged, inter alia, not only that the administrative remedies available to federal civilian employees pre-empted *Bivens*-type suits but also, in effect though not in terms, that those administrative remedies were gracious facets of a pervasively preclusive special relationship between the Federal Government and its civilian employees. Supplemental Brief for Appellee, at 16--20 *et passim*, *Bush v. Lucas*, 647 F. 2d 573 (5th Cir. 1981). In that brief, the Department of Justice cited and discussed *Bishop v. Tice* as recognizing the existence of administrative remedies as "'a special factor counseling hesitation' in the creation of a constitutionally based remedy for a wrongful dismissal." (*Ibid.*, at 27-28.)

Those aberrations and the resultant confusion arise, in our judgment, from misreadings of *Carlson*. They should not be allowed to proliferate.

That brief bore fruit in the Fifth Circuit opinion presently sought to be brought under review.

To judge from a rejoinder-item provided us by counsel for the plaintiff in a case reportedly pending in the United States District Court for the District of Columbia, the Government there has made substantially the same use of *Bishop v. Tice* which it made upon remand in the case at bar. Plaintiff's Opposition to Motion to Dismiss Individual Defendants at 11--12, *Mundy v. Brown*, No. 80-2096, D. C. Dist. 1980.

And, as we observe in text infra, the Department of Justice appears currently to be blending the Fifth Circuit opinion on remand with the Eighth Circuit opinion in *Bishop v. Tice* and with this Court's decision in *Brown v. GSA*, 425 U.S. 820 (1976), in an effort to induce the Seventh Circuit to grant a rehearing *en banc* in *Sonntag v. Dooley*, 650 F. 2d 904 (7th Cir. 1981).

2. *To resolve an emerging conflict among the courts of appeal.*

In the decision sought to be brought under review upon this petition, the Fifth Circuit squarely has held that

> the Government employer-employee relationship ..., is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress.
>
> (647 F. 2d at 577; App. A, p. a-12.)

In addition, the Fifth Circuit clearly has intimated that, even if it did not presently hold that such relationship per se constitutes "a special factor counselling hesitation" in the inferring of a *Bivens*-type remedy for a federal civilian employee who seeks to recover damages from another fed-

eral civilian employee for unconstitutional conduct in procuring the plaintiff's demotion, that Circuit would join the Eighth Circuit in finding such a "special factor" in the existence of civil service remedies which a *Bivens*-type remedy might encourage federal employees to by-pass. (647 F. 2d at 577; App. A, p. a-11, citing and closely paraphrasing, but not quite quoting, *Bishop v. Tice, supra.)*

In *Sonntag v. Dooley*, 650 F. 2d 904 (7th Cir. 1981), the Seventh Circuit has reversed a district court dismissal of a former federal employee's complaint seeking damages from government employees for coercing the plaintiff's resignation by conduct which allegedly, if somewhat loosely, included constitutional deprivations. In so reversing the district court, the Seventh Circuit has both distinguished and reconciled *Bishop v. Tice* (650 F. 2d at 907.) The Seventh Circuit's ground for

distinguishing *Bishop* is that the latter did not involve a coerced resignation. (*Ibid.*) The Seventh Circuit's basis for reconciling *Bishop* and *Sonntag* is that

> both the majority and the dissent in *Bishop* agreed that if the plaintiff there could prove that his failure to exhaust adminstrative remedies had been due, as alleged, to defendants' misconduct, he would have an actionable procedural due process claim such as that advanced by ...[the *Sonntag*] plaintiff....
>
> (*Ibid.*)

In applying for rehearing in *Sonntag*, the Justice Department attorneys assert, among other things, that:

> ****The [*Sonntag*] panel's ruling... conflicts directly with *Bush v. Lucas*, 647 F. 2d 573 (5th Cir. 1981) and *Bishop v. Tice*,

622 F. 2d 349 (8th Cir. 1980); and that

**** **** ****

> In light of the *compelling Bush v. Lucas* rationale,... [the Seventh Circuit] should look again at the panel's unprecedented ruling that civil servants may circumvent the civil service system, and vindicate their *job grievances* in lawsuits under *Bivens*.
>
> (Petition for Rehearing and Suggestion of Rehearing *en banc* at 1, 2 [emphasis at *compelling* and at *job grievances* ours], *Sonntag v. Dooley*, No. 80-2435, 7th Cir.)

Even discounting both hyperbole and dissonance, it does appear that there is

in fact an emerging, if not already emerged, conflict in principle among decisions of the several courts of appeal with respect to one or both the important questions presented for review on this petition. Such conflict, we submit, should be resolved before it begets widespread lack of uniformity.

CONCLUSION

For the reasons set forth above, Bush submits that a writ of certiorari should issue to review the 12 June 1981 judgment and opinion of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

WILLIAM HARVEY ELROD, JR.,
205 Holly Street, N.E.,
P. O. Box 632,
Decatur, AL 35602,
Tel. No. 205-3552644,

Attorney for Petitioner.

4 September 1981.

APPENDIX A

[647 F.2d 573]

William C. BUSH, Plaintiff-Appellant,

v.

William R. LUCAS, Defendant-Appellee.

No. 77-1615

United States Court of Appeals,

Fifth Circuit.

Unit B

June 12, 1981.

* * * *

[*574]

*Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, Chief Judge, and SIMPSON and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This case is on remand from the Supreme Court for further consideration in light of *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). In our prior opinion we held, first, that

plaintiff's defamation claim against the director of the Marshall Space Flight Center was precluded by *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), and second, that plaintiff had no cause of action for damages under the First Amendment for retaliatory demotion in view of the available remedies under the Civil Service Commission regulations. *Bush v. Lucas*, 598 *F.2d 958 (5th

[*575]

Cir. 1979), *vacated and remanded*, 446 U.S. 914, 100 S.Ct. 1846, 64 L.Ed.2d 268 (1980). After due consideration of supplemental briefs filed by the parties, we conclude that *Carlson* does not dictate a contrary result. Summary judgment for defendant is therefore reaffirmed.

We note at the outset that our reconsideration of this case proceeds on the assumption that the Supreme Court's one-sentence order vacating and remanding *Bush* should not be read as implying that *Carlson* necessarily mandates reversal. It is our understanding in this type of remand that the Court has merely "flagged" this case as one upon which the intervening decision may have some bearing, but

which the Court has not conclusively determined to be materially affected thereby.

The facts of the case are adequately set out in *Bush*, 598 F.2d 958, and will not be repeated here. With regard to Bush's state law defamation claim, the Court previously held that under *Barr v. Matteo* defendant Lucas was protected from liability by absolute official immunity inasmuch as the alleged defamatory statement to the press fell within his duties as director of the space center. Nothing in *Carlson* affects or casts doubt upon this holding and we therefore reinstate without change that portion of the Court's prior opinion addressing the defamation issue. *Bush*, 598 F.2d at 960.

The decision in *Carlson*, however, by detailing in what circumstances an individual's right to seek damages from federal officials for constitutional violations can be defeated, directly bears upon this Court's holding that Bush cannot seek damages from his supervisor for retaliatory demotion. In *Carlson*, the Court held the plaintiff could maintain an action for damages against federal prison officials for constitutional violations even though

she also could sue the Federal Government under the Federal Tort Claims Act (FTCA). The Court stated that under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the victim of a constitutional violation by a federal agent has a right to recover damages against the agent in federal court, which right can be defeated in a particular case in only two situations:

> The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress" [*Bivens*,] 403 U.S., at 396 [91 S.Ct. at 2004]; *Davis v. Passman*, 442 U.S. 228, 245 [99 S.Ct. 2264, 2276, 60 L.Ed.2d 846 (1979). The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens*, *supra*, at 397 [91 S.Ct. at 2005]; *Davis v. Passman*, 442 U.S., at 245-247[99 S.Ct. at 2276-78].
> *Carlson*, 446 U.S. at 18-19, 100 S.Ct. at 1471-72.

Neither situation was found to be

present in *Carlson*. There were no special factors counseling hesitation, and not only did the Court find no explicit congressional declaration that persons injured by federal officers' Eighth Amendment violations could not recover damages from them, but it in fact found in the legislative history of the 1974 FTCA amendments evidence that Congress intended the FTCA to complement rather than to replace the *Bivens* remedy. *Id.* at 19-20, 100 S.Ct. at 1472. Four additional factors, each suggesting the *Bivens* remedy was more effective than the FTCA remedy, buttressed the Court's conclusion that the FTCA was not intended to preempt the *Bivens* remedy. *Id.* at 20-23, 100 S. Ct. at 1472-1474.

Applying *Carlson* to this case, Bush is entitled to seek a constitutional damage remedy for retaliatory demotion unless the defendant can demonstrate either that special factors are present which counsel hesitation in the absence of affirmative action by Congress, or that Congress has provided an alternative remedy which it intended as a substitute for, and considered equally effective as, a

Bivens remedy. Since we find special factors counseling hesitation, we need not consider the alternative remedy question.

[*576]

*There is little guidance in the Supreme Court opinions as to what "special factors" will justify withholding a *Bivens* remedy. The Court found no special factors present in either *Bivens*, 403 U.S. at 396-397, 91 S.Ct. at 2004-05, or *Carlson*, 446 U.S. at 19, 100 S.Ct. at 1472, and any concerns created in *Davis v. Passman* by defendant's status as a congressman were held to be coextensive with the protections afforded him by the Speech and Debate Clause, 442 U.S. 228, 246, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979).

Defendant persuasively argues, however, that in this case the unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy in the absence of affirmative congressional action. The role of the Government as an employer toward its employees is fundamen-

tally different from its role as sovereign over private citizens generally. This distinction has been recognized in numerous Supreme Court cases. In *Sampson v. Murray*, 415 U.S. 61, 83, 94 S.Ct. 937, 949, 39 L.Ed.2d 166 (1974), a case involving the dismissal of a probationary civil servant, the Court noted the "well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'" The governmental employer-employee relationship was a significant factor in *Arnett v. Kennedy*, 416 U.S. 134, 155, 94 S.Ct. 1633, 1644, 40 L.Ed.2d 15 (1974), which held a civil service employee had no due process right to a pre-termination evidenciary hearing. Justice Powell, concurring in *Arnett*, emphasized "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs." *Id.* at 168, 94 S.Ct. at 1651. Specifically regarding the exercise of First Amendment rights by public employees, the Court has said,

> it cannot be gainsaid that the State has interests as an employer in regu-

> lating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

This special relationship affects not only the substantive rights of public employees, but also the way in which an aggrieved employee can assert and redress his rights in the employment context. Consistent with the notion that the Government should have wide latitude and control over its employees, Congress, rather than the courts, has traditionally carried the burden of regulating the Government employer-employee relationship. Be-

ginning with the enactment of the Pendleton Act of 1883 and through the Lloyd-La Follette Act of 1912 and the Back Pay Acts of 1948 and 1966, Congress has sought to achieve a proper balance between promoting governmental efficiency and protecting the rights of employees aggrieved by improper personnel action. This process of fine tuning has continued with the enactment of the Civil Service Reform Act of 1978 and has been supplemented by detailed administrative regulations.

As outlined in our prior opinion, *Bush*, 598 F.2d at 961, when Bush was demoted in 1975 he was protected by specific notice and review procedures and was entitled to retroactive back pay in the event his administrative appeal was successful. He could seek review of an adverse decision of the Civil Service Commission in federal court. Bush in fact pursued these remedies and was eventually reinstated with back pay by the Commission's Appeals Review Board.

We stress the remedies made available by Congress to an aggrieved civil servant in order to emphasize the care

Congress has taken to carefully balance the employee's rights as a citizen with the Government's interest in the efficient conduct of the nation's business.*

[*577]

The very comprehensiveness of the legislative and administrative scheme evinces Congress' awareness of the special relationship and of the Government's responsibilities toward its civil service employees.

The employer-employee context of this case serves to distinguish it from suits such as *Bivens* and *Carlson* which involved plaintiffs as private citizens seeking damages against agents of the Govenrment acting in its sovereign capacity. Inferring a *Bivens* remedy in this case would tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the

framework it has so painstakingly established. Ultimately, it would provide a disincentive for Congress to continue improving the mechanisms by which an aggrieved employee can protect his rights.

These concerns have also been expressed by the Eighth Circuit in *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980). There, the plaintiff alleged that three federal employees coerced him into abandoning his job as a federal safety engineer by threatening to lodge criminal charges against him. With regard to Bishop's substantive due process claim, the court held the existence of civil service remedies, coupled with the fact that a parallel *Bivens* remedy would encourage federal employees to bypass these precedures, constituted a special factor counseling hesitation in creating a constitutionally based remedy for wrongful dismissal. *Id.* at 357. The court noted it had examined *Carlson v. Green* and found its decision in *Bishop* consistent therewith. *Id.* at 357 n. 16.

While the result in this case might be different if failure to recognize a *Bivens* remedy would leave Bush, as the

congressional employee in *Davis v. Passman*, without any remedy, this of course is not the case. We therefore find, consistent with *Carlson v. Green*, that the Government employer-employee relationship present in this case is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress. In light of this holding, we do not and need not under *Carlson* reach the question of whether Congress intended the civil service remedies to be an equally effective substitute for a *Bivens* remedy. We hold only that absent more explicit direction from Congress, a *Bivens* remedy should not be inferred.

AFFIRMED.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 28, 1980

William Harvey Elrod, Jr., Esq.
Hutson & Elrod
205 Holly Street, N.E.
Decatur, AL 35601

RE: William C. Bush
v. William R. Lucas
No. 79-1044

Dear Mr. Elrod:

The Court today entered the following order in the above-entitled case:

"The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeal for the Fifth Circuit for further consideration in light of *Carlson v. Green*, 445 U.S. ___ (1980)."

Very truly yours,

MICHAEL RODAK, JR., Clerk

by

Francis J. Lorson
Deputy Clerk

81-469

Office-Supreme Court, U.S.
FILED
SEP 4 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO.

WILLIAM C. BUSH,
Petitioner

vs.

WILLIAM R. LUCAS,
Respondent

APPENDICES C THROUGH J TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT - UNIT B

C: COURT OF APPEALS DECISION, DATED JULY 12, 1979, AND RELATED MEMOS;
D: DISTRICT COURT DECISION;
E, F, & G: ADMINISTRATIVE DECISIONS;
H: CONST. PROVS., STATS., & REGS. INVOLVED;
I: NUMBER OF FEDERAL EMPLOYEES;
J: NUMBER OF FEDERAL PRISONERS

WILLIAM HARVEY ELROD, JR.
205 Holly St. N.E.
Decatur, AL 35601

Attorney for Petitioner

O. Davis Enterprises, 2115 Whitesburg Dr. S.E.
Huntsville, AL 35801

APPENDICES

C

THROUGH

J

APPENDIX C

(598 F.2d 958)

William C. BUSH, Plaintiff-Appellant,

v.

William R. LUCAS, Defendant-Appellee.

No. 77-1615.

United States Court of Appeals,

Fifth Circuit.

July 12, 1979.

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, SIMPSON and RONEY, Circuit Judges.

RONEY, Circuit Judge:

In this action for damages against the director of a federal space flight center for alleged defamation and an alleged retaliatory demotion in violation of First Amendment protections, the district court granted defendant's motion for summary judgment on the grounds that he was shielded by absolute immunity under *Barr v. Matteo*, 360 U.S. 564, 571, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), and that plaintiff had no constitutional cause of action in view of the available administrative remedies under the

Civil Service Commission regulations. 5 C.F.R. §§ 752.201-752.402 (1974).

Subsequent to the issuance of the district court's summary judgment, the Supreme Court decided *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1979), involving immunity of federal officials from suit. At the time of oral argument in this case the Supreme Court had also granted a petition for certiorari in our *en banc* decision in *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978), in which this Court had denied an implied cause of action in a sex-based employment discrimination suit for damages against a member of Congress. We withheld decision of this case pending the Supreme Court's review of *Davis v. Passman*.

The Supreme Court has now reversed the *en banc* decision in *Passman* and, with a detailed opinion, ____U.S. ____, 99 S.Ct. 2264, 60 L.Ed.2d 846 held the plaintiff had a constitutionally implied cause of action for damages for an alleged

violation of the equal protection component of the due process clause of the Fifth Amendment. Because *Butz v. Economou* affords the defendant immunity in the defamation part of this claim, and the rationale of *Davis v. Passman* forecloses a cause of action for damages under the circumstances of this case, we affirm the denial of relief by the district fourt.

Plaintiff, William C. Bush, is an aerospace engineer and for several years had been a civil service employee at Marshall Space Flight Center. In an interview on Huntsville Television Station WHNT, Bush stated that he was not productively employed. The same day, *The Huntsville Times* quoted Bush as having said that his position at the Space Flight Center was "a falsehood, a travesty and worthless." Nearly a month later Bush appeared on another WHNT-TV interview in which he made statements to the effect that he had meaningful work to do only a small percentage

of each day. Mr. Bush's various statements were disseminated nationally by the wire services and appeared in newspapers in at least three states other than Alabama.

In commemoration of the Marshall Space Flight Center's fifteenth anniversary, defendant William R. Lucas, the director of the Center, presided at a press conference held several weeks following plaintiff Bush's second televised interview. After what Bush asserted was the conference's conclusion, a WHNT television reporter asked Lucas to respond to Bush's charges that he did not have enough meaningful work to do. Bush claims he was labeled a liar by Lucas' reply that "I have had (Bush's) statement investigated and I can say unequivocally that such a statement has no basis in fact."

(*960)

*Personnel action was initiated several months after Lucas made the alleged defamatory statement to remove Bush from his position. After a

hearing, Lucas, as deciding official, notified Bush of his reduction in grade from GS-14 to GS-12. Bush appealed the adverse action to the United States Civil Service Commission, which sustained the agency's action.

Plaintiff Bush commenced this action in state court, and on motion by defendant Lucas the case was removed to federal court. Plaintiff sought damages from Lucas for the allegedly false statements Lucas made about Bush on June 25, 1975, and for Bush's demotion as a federal government employee, with attendant reduction in salary. Bush alleged that his demotion and Lucas' comments were motivated by Lucas' malicious intent to punish Bush for public comments he had made about his job.

Defamation Claim

The district court held that defendant Lucas is protected by absolute official immunity from

liability for the defamation claim. *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959). Plaintiff Bush argued if any immunity is available it is qualified by a good faith standard. *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1979).

For purposes of deciding the motion the district court assumed as true plaintiff's allegation that Lucas' press statement was false, motivated by malice and that summary judgment for defendant Lucas would be appropriate only if he was protected by absolute immunity.

Viewing *Barr v. Matteo*, *supra*, as controlling, the district court concluded Lucas was entitled to absolute immunity as to any claim based on his statements to the press. In *Barr* the Supreme Court held that, despite allegations of malice, statements made by a federal executive official within the "outer perimeter" of his line of duty fall within the privilege of absolute immunity

against defamation actions.

Barr involved a press release by Government officials announcing an intention to suspend the plaintiffs because of the part which they had played in formulating a plan for utilization of certain agency funds. Plaintiffs sued for libel, alleging malice. The Court said it had granted certiorari to decide the precise issue of whether the defendant's "claim of absolute privilege should have stood as a bar to maintenance of the suit despite the allegations of malice made in the complaint." 360 U.S. at 569, 79 S.Ct at 1338. The Court then held that "[t]he fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint." 360 U.S. at 575, 79 S.Ct. at 1341.

[1] We are unable to distinguish the instant case from *Barr*. Lucas' statement to the press fell well within his duties as director of the

space center. Although Bush's complaint alleges that Lucas' statement was beyond the "outer perimeter" of his duties, plaintiff offered no evidence to support his conclusion. Defendant's statement to the press came upon an inquiry regarding the Center, its employees, and Bush's employment related statements. Lucas had a responsibility to respond. *Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872-873 (5th Cir. 1978).

Plaintiff argues that *Butz v. Economou, supra*, would give defendant only a qualified immunity if his actions violated plaintiff's constitutional rights. This argument is irrelevant here because Lucas' statements to the press could not have violated plaintiff's claimed First Amendment rights, even if the demotion may have. The district court noted that the mere speech of one person cannot violate the free speech rights of another.

To the extent plaintiff may be claiming that his (Bush's) First Amendment rights were violated by Lucas' comments at the press conference, the court disagrees. A person's freedom of speech is not abridged by another's speech in reaction thereto, even if assumed to be defamatory.

*Retaliatory Demotion Claim

[*961]

[2] Bush claims a right under the Constitution for damages resulting from his demotion in retaliation for his public comments about his employment.

The district court had before it and followed as controlling our panel decision in *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), which had held Ms. Davis had a right to maintain an action for damages under the Fifth Amendment against a congressman. Although later vacated by the Fifth Circuit *en banc* the legal analysis in the

panel opionin was eventually upheld when the Supreme Court reversed the *en banc* decision. The district court noted that administrative review was available as a means of overturning wrongful demotions or dismissals of civil service employees such as Bush, no such relief being available to the *Passman* plaintiff. Reinstatement was not realistic in that case because plaintiff's former job would disappear with defendant's congressional tenure, which expired the same month of the court's decision. Moreover, the panel of our Court had expressed reluctance to order reinstatement of a representative's personal assistant.

The Supreme Court made the same observation as to the absence of any administrative remedies to Ms. Davis and specifically noted that "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." *Davis v. Passman*, *supra*____U.S. at____, 99 S.Ct. at 2278. Thus we read *Passman*

as not giving an optional remedy in addition to already sufficient remedies for wrongful action of a Government agent, but as an alternative when damage relief is needed.

Under the Civil Service regulations there is a notice and review procedure which permits an employee to challenge adverse personnel actions, including demotions. See 5 C.F.R. § 752.201 (employees covered); § 752.202 (notice and reasons for adverse action must be given); § 752.203 (employee's right to appeal to the Commission); § 752.104, 731.202 (standards governing adverse actions); § 752.402 (reversal of adverse action may entitle employee to restoration retroactive to date of improper action). The district court had before it the following information footnoted in its opinion:

> As already indicated, Bush appealed his demotion and that appeal was heard and the demotion sustained by the Civil Service

Commission. Although Bush had the further opportunity to appeal from the Commission to the United States District Court, it does not appear that he did so. The court is not now undertaking any review of the Civil Service Commission's decision, but is simply noting that the demotion, if truly wrongful, was not without redress and plaintiff has had his day in court in another forum to prove the facts he now alleges, while seeking there, admittedly, relief from the government rather than from Lucas personally.

It now appears that plaintiff was administratively restored to his original status from the date of the adverse personnel action several months before the oral argument in this Court. The district court was correct in concluding:

> In view of plaintiff's administrative review opportunities and the importance of the government's interests in promoting the

efficiency and integrity of its public services through its employees, the Court concludes that Bush's public statements about his duties do not rise to the level of constitutional protection such that he can maintain an action in damages based on his demotion, allegedly contrived as a punishment for those statements.

We thus find that the district court correctly analyzed Bush's constitutional claims under the principles that have now been announced in *Davis v. Passman*.

AFFIRMED.

APPENDIX C2

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT Tel 504-589-6514

OFFICE OF THE CLERK 600 Camp St.
New Orleans, La.
70130

July 23, 1979

Edward W. Wadsworth
Clerk

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 77 - 1615 - WILLIAM C. BUSH vs.
WILLIAM R. LUCAS

Gentlemen:

The following action has this day been taken in the above case:

An extension of time has been granted to and including August 3, 1979*

Very truly yours,
EDWARD W. WADSWORTH, CLERK

By S/ Julie Harrison
Deputy Clerk

cc: Mr. Harvey Elrod
Mr. Henry I. Frohsin

*MUST BE PHYSICALLY FILED IN THIS OFFICE BY THIS DATE.

APPENDIX C3

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

Tel 504-589-6514
600 Camp Street
New Orleans, La.
70130

Edward W. Wadsworth
Clerk

August 7, 1979

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 77 - 1615 - William C. Bush vs.
William R. Lucas

Gentlemen:

The following action has this day been taken in the above case:

An extension of time has been granted to and including August 7, 1979*

Very truly yours,
EDWARD W. WADSWORTH, CLERK

By S/ Betty Martinez /MBB
Deputy Clerk

cc: Mr. Harvey Elrod
Mr. Henry I. Frohsin

*MUST BE PHYSICALLY FILED IN THIS OFFICE BY THIS DATE.

APPENDIX C4

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

Gilbert F. Ganucheau
Clerk

October 4, 1979

TO ALL PARTIES LISTED BELOW:

No. 77 - 1615 - WILLIAM C. BUSH v.
WILLIAM R. LUCAS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By (s) Sally Hayward
Deputy Clerk

cc: Mr. Harvey Elrod
Messrs. J. E. Brooks
Henry I. Frohsin

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Northeastern Division

WILLIAM C. BUSH,	)	
	)	
Plaintiff,	)	
	)	
-vs.-	)	No. CA 76-P-0962-NE
	)	
WILLIAM R. LUCAS,	)	
	)	
Defendant.	)	

O R D E R

For reasons set forth in the accompanying Memorandum of Opinion, the court concludes that defendant's motion for summary judgment is due to be granted. Accordingly, it is ORDERED, ADJUDGED and DECREED that, there being no genuine issues as to any material fact, summary judgment is hereby granted in favor of defendant William R. Lucas.

Costs to be taxed against plaintiff.

Done this the 4th day of February, 1977.

s/ Sam C. Pointer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Northeastern Division

WILLIAM C. BUSH, Plaintiff,	)	
-vs.-	)	No. CA 76-P-0962-NE
WILLIAM R. LUCAS, Defendant.	)	

MEMORANDUM OF OPINION

This cause arises upon defendant's motion for summary judgment. Plaintiff, William Bush, seeks damages from the Director of the George C. Marshall Space Flight Center, William R. Lucas, for allegedly false statements Lucas made about Bush on June 25, 1975 and for Bush's demotion as a federal government employee, with attendant reduction in salary. Bush alleges that his demotion and Lucas' comments were motivated by Lucas' malicious intent to punish Bush for public comments he had made about his job.

Plaintiff is an aerospace engineer and for several years has been a civil service employee at Marshall Space Flight Center. On May 15, 1975, in an interview on Huntsville Television Station WHNT, Bush stated that he was not productively employed. The same day, The Huntsville Times quoted Bush

as having said that his position at the Space Flight Center was "a falsehood, a travesty and worthless." On June 16, 1975 Bush appeared on another WHNT-TV interview in which he made statements to the effect that he had meaningful work to do only a small percentage of each day. Mr. Bush's various statements were disseminated nationally by the wire services and appeared in newspapers in at least three states other than Alabama.

On June 25, 1975, Lucas presided at a press conference held in commemoration of the Center's fifteenth anniversary. After what Bush asserts was the conference's conclusion, a WHNT television reporter asked Lucas to respond to Bush's charges that he did not have enough meaningful work to do. Bush claims he was labeled a liar by Lucas' reply that "I have had [Bush's] statement investigated and I can say unequivocally that such a statement has no basis in fact." This statement forms the basis of Bush's defamation claim.

In August 1975 an adverse personnel action was initiated to remove Bush from his position. After a hearing, Lucas, as deciding official, notified Bush of his reduction in grade from GS-14 to GS-12. Bush

appealed the adverse action to the United States Civil Service Commission, which sustained the agency's action. This demotion forms the basis of Bush's claim that Lucas conspired to deprive plaintiff of his first amendment rights of free speech and to petition Congress.

DEFAMATION CLAIM

While defendant claims an absolute official immunity from liability for his statements impinging Bush's truthfulness, plaintiff urges that if any immunity is available, it is qualified by a good faith standard. For purposes of this motion, the court will take as true plaintiff's assertion that Lucas' press conference statement was false and motivated by malice. Thus, summary judgment in favor of Lucas would be appropriate only if he is protected by an absolute immunity. A review of the relevant case law indicates that plaintiff is indeed protected by no less than absolute immunity from liability for this defamation claim.

Barr v. Matteo, 360 U. S. 564 (1959) is controlling on this point. In *Barr* the Supreme Court held that, despite allegations of malice, statements made by a federal

executive official within the "outer perimeter" of his line of duty fall within the privilege of absolute immunity against defamation actions. The defendant in *Barr*, Acting Director of the Office of Rent Stabilization, issued a press release in which he announced his intention to suspend certain employees for conduct for which the agency had been criticized. The conduct being punished (questionable terminal leave payments to employees who were then rehired) had been subject to considerable Congressional and news media inquiry. The employees concerned brought an action for defamation against the Acting Director, charging that the news release defamed them. After reviewing the scope of defendant's duties as Acting Director, the Court concluded that the press release fell within the "outer perimeter" of defendant's official responsibilities and that plaintiffs were absolutely barred from pursuing the defamation claim based on the release.

In the instant case, Lucas' July 25, 1975 statement to the press fell well within the outer perimeter of his duties as MSFC Director. Although Bush's complaint alleges that Lucas' statement was beyond

the "outer perimeter" of his duties, plaintiff offers no evidence to support his conclusion.[1] Conversely, defendant's affidavit

---

1. While the affidavit of Leslie W. Ball attempts to contradict defendant's evidence as to the scope of his duties, it is conclusory only and does not raise any serious or bona fide dispute. Furthermore, the affidavit of Barry J. Casebolt, by asserting that the June 25, 1975 press conference had been adjourned when Lucas made the utterance at issue, does not undermine the conclusion that no factual issue exists as to whether Lucas acted within the outer bounds of his duties. There being no genuine dispute that, at a press conference, Lucas' responses to press inquiries regarding the Center and its employees would constitute part of his employment responsibilities, there can be no question, as a matter of law, that the same responses immediately after a conference's conclusion would at least fall within the outer perimeter of his responsibilities. *See Barr v. Matteo*, *supra* (statement made at defendant's own initiative, not at press conference or even thereafter).

and deposition (including the attached official job description) compel the conclusion that response to press inquiries is within the official responsibilities of the Center Director. There simply is no genuine factual dispute as to the scope of defendant's duties. Consequently the absolute immunity applied in Barr must be granted Lucas to protect him from liability for the alleged defamation.

Cases cited by plaintiff decided since Barr do not effectively undermine this conclusion. Although the law relative to an executive official's immunity has developed considerably since 1959, it has not changed the holding of Barr, at least as it applies to factual context of this lawsuit. The cases in which government officials have been held subject to liability for violation of plaintiffs' constitutional rights are inapposite. When constitutional rights are threatened, a court could well strike the balance in favor of the plaintiff and require the government official to prove his good faith before he can accept the protection of immunity from suit. Absent constitutional deprivations in the instant case, the need for absolute official immunity is overriding and essential to enable government officials to

> exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties--suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government. [*Barr v. Matteo*, 360 U.S. 564, 571 (1959)].

Several courts, including the United States Supreme Court, have recognized the need to distinguish in this context between constitutional and common law rights, the importance of balancing the need for immunity against the importance of plaintiff's interests, and the availability of absolute immunity in appropriate cases. See e.g., *Scheuer v. Rhodes*, 416 U. S. 232 (1974,; *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, No. 72-1899 (D.C. Cir. June 28, 1976); *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974).

Nor do the two cited cases which grant only qualified immunity to an official

sued on a nonconstitutional cause of action compel a contrary conclusion. The Second Circuit in *Economou v. United States Department of Agriculture* permitted a former registered futures commission merchant to maintain an action for defamation and wrongful institution of administrative procedures against Agriculture Department officials who were protected by a qualified immunity only. 535 F.2d 688 (CA2 1976). In *Expeditions*, *supra*, [2] the D. C. Circuit granted only qualified immunity to a department chairman at the federal Museum of Natural History who was sued for libel.

In neither case was the plaintiff a government employee seeking damages from a supervisor for his public comments regarding the employee's job-related conduct. In *Expeditions* the court recognized this difference when it admitted that in *Barr* the plaintiffs' conduct (and publicity about it to the general public as well as within the agency)

---

2. The decision was vacated and the case reheard in December, 1976. The opinion upon rehearing has not been issued as of this date.

> 'directly and severely challenged' the integrity both of the defendant and of the internal operations of the agency which defendant headed, which made essential some action in the nature of that which was taken. The essential character of that single action to all future operations of the agency was found to justify absolute immunity, as a means of eliminating any significant risk that fear would be an immobilizing force. *Expeditions*, *supra*, at 27.

In *Barr* and in the instant case, the risk that plaintiff's action would undermine employee morale and efficiency as well as the public's right to governmental response to criticism, required that the defendant supervisor be able to comment upon those actions without the threat of suit, which might prevent any meaningful or effective response. Because anything less than absolute immunity in these circumstances might adversely affect the performance of governmental duty by stifling a supervisor's response to his own employees' charges and because it would thus threaten the very integrity of the governmental

agency, the court concludes that Bush cannot maintain his defamation claim based on Lucas' July 25, 1975 press statements.

CONSTITUTIONAL CLAIM

Bush also seeks damages for alleged violation of his First Amendment rights of freedom of speech and of petition to Congress[3] resulting from defendant's alleged conspiracy with other persons to institute an adverse personnel action against

---

3. Although plaintiff sought to amend his complaint to set forth violations of his fifth and fourth amendment rights, he has not indicated any factual allegations not already in the complaint. None of the alleged events give rise to even a colorable fourth or fifth amendment issue and plaintiff has not offered any theory to explain his reliance on these amendments, so this memorandum of opinion does not deal with them.

plaintiff[4], whereby plaintiff was reduced two General Schedule grades in the civil service. The action allegedly was taken to punish plaintiff for his public criticism of his own job and to prevent future public comments on the same subject.

The claimed right to damages for constitutional violations by a federal official is based on the seminal case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which the Supreme Court held that a damages remedy for an unconstitutional search and seizure could be implied directly from the Constitution. Courts since have permitted maintenance of damage suits for violations of other constitutional rights. *See, e.g., Davis v. Passman,*

---

4. To the extent plaintiff may be claiming that his (Bush's) First Amendment rights were violated by Lucas' comments at the press conference, the court disagrees. A person's freedom of speech is not abridged by another's speech in reaction thereto, even if assumed to be defamatory.

No. 75-1691 (CA5 Jan. 3, 1977) (fifth amendment equal protection); *Reeves v. City of Jackson*, 532 F.2d 491, 495 (CA5 1976) (alleged violation of Eighth Amendment and Fourteenth Amendment due process).

Assuming, without deciding, the truth of plaintiff's factual allegations and the existence of a damage remedy for First Amendment violations by a federal official, the court is of the opinion that Bush has not shown a constitutional deprivation for which relief can be granted.

The Supreme Court has set forth a test applicable to Bush's alleged punishment for his public comments:

> The question of whether speech of a [government employee] is constitutionally protected expression necessarily entails striking a balance between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and in the interest of the [government] as an employer in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (*Mt. Healthy Board of Education v. Doyle*, 45 U.S.L.W. 4079, 4082 (Jan. 11, 1977)).

In *Mt. Healthy Board of Education*, the Court accepted the trial court's finding that a communication made by a teacher to the press regarding the school dress code was protected by the First and Fourteenth Amendments. Plaintiff had carried his burden by showing that his communication was a "motivating factor" in the Board's decision to dismiss him and he would prevail upon remand unless the Board could demonstrate that it would have dismissed plaintiff even in the absence of the constitutionally protected conduct.

This court does not reach the issue of causation. Even assuming that Bush's press communication was one, or even the sole, cause for his demotion, it does not necessarily follow, under the Supreme Court's balancing test, that he is constitutionally protected from all adverse personnel actions precipitated thereby. The government's interest in restricting challenges of personnel actions to the administrative remedies outweighs Bush's interest in securing relief beyond the administrative route for his demotion. The government would be harmed more by the maintenance of this action than would the plaintiff by its termination, in view of

the alternative route available to plaintiff for redressing the allegedly wrongful demotion.

The circumstances here stand in contrast to those in *Davis v. Passman*, *supra*, in which the Fifth Circuit denied absolute immunity to Congressman Passman, whose dismissal of his staff member allegedly violated her Fifth Amendment right to equal protection of the laws. Whereas administrative review is available as a means of overturning wrongful demotions or dismissals of civil service employees such as Bush[5], no

---

5. As already indicated, Bush appealed his demotion and the appeal was heard and the demotion sustained by the Civil Service Commission. Although Bush had the further opportunity to appeal from the Commission to the United States District Court, it does not appear that he did so. The court is not now undertaking any review of the Civil Service Commission's decision, but is simply noting that the demotion, if truly wrongful, was not without redress and plaintiff has had his day in court in another forum to prove the facts he now alleges, while seeking there, admittedly, relief from the government rather than from Lucas personally.

such relief was available to the Passman plaintiff. Reinstatement was not realistic there because plaintiff's former job would disappear with defendant's Congressional tenure, which expired the same month of the court's decision. Moreover, the court expressed reluctance to order reinstatement of a representative's personal assistant. Conversely, reinstatement of plaintiff herein to his former position by the Civil Service Commission was a possible solution and would have been an effective remedy since his former duties did not require a close working relationship with the defendant.

In view of plaintiff's administrative review opportunities and the importance of the government's interests in promoting the efficiency and integrity of its public services through its employees, the Court concludes that Bush's public statements about his duties do not rise to the level of constitutional protection such that he can maintain an action in damages based on his demotion, allegedly contrived as a punishment for those statements.

There being no genuine issue as to any material fact, defendant is entitled to prevail as a matter of law. Summary

judgment is due to be granted and will be entered by separate order.

This the 4th day of February, 1977.

s/ Sam C. Pointer, Jr.
United States District Judge

APPENDIX E

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
ATLANTA FIELD OFFICE
ATLANTA, GEORGIA 30309

APPEAL OF MR. WILLIAM C. BUSH
UNDER PART 752, SUBPART B, OF THE
CIVIL SERVICE REGULATIONS
DECISION NUMBER AT752B60394
DECIDED ON AUGUST 12, 1976

I. INTRODUCTION

By letter received in the Atlanta Field Office on December 17, 1975, as supplemented, the above-referenced appellant submitted an appeal from an adverse decision by the Director, George C. Marshall Space Flight Center, Huntsville, Alabama, (hereinafter referred to as MSFC), to effect his change to lower grade on November 30, 1975, from the position of Supervisory Aerospace Engineer, GS-14, $34,916 per annum, to Aerospace Engineer, GS-12, $25,200 per annum, MSFC. The adverse action was based on charges of making certain

public statements, which produced allegedly unfavorable reaction.

It has been established that this appeal comes within the purview of Subpart B, Part 752 of the Civil Service Regulations and that it was timely filed. Accordingly, it has been accepted for adjudication.

The appellant requested a hearing open to the press and public, and such hearing was held by a representative of the Federal Employee Appeals Authority at Huntsville, Alabama, on June 8, 9, and 10, 1976. A verbatim transcript of the hearing is a part of the permanent record in this case.

II. BACKGROUND

The record reveals that MSFC, and particularly, the Directorate of Science and Engineering (SE), became involved in a major reorganization and a concurrent reduction in force, effected on June 11, 1974, because of reduced funds and a change in mission. On that date, the appellant was

reassigned from Position No. 18627, Aerospace Engineer, AST, Flight Structures, GS-14, Systems Products Office, SE, to Position No. 17610 (same title, series and grade), Auxiliary Equipment Branch, Structures Division, Structures and Propulsion Laboratory, SE. The appellant submitted an appeal to the Civil Service Commission alleging that the reassignment was a reduction in rank and, at the same time, appealed the classification of Position No. 17610. Before a final decision was issued on these appeals, an evaluation by the agency revealed that the correct grade level of Position No. 17610 was GS-13. When the appellant was reassigned, on November 10, 1974, to Position No. 19343-S, Supervisory Aerospace Engineer, AST, Flight Structures, GS-14, in the Auxiliary Equipment Branch, the Civil Service Commission terminated his classification appeal regarding Position No. 17610 on the basis that the appellant no longer occupied that position.

On February 28, 1975, the Commission's Appeals Review Board issued a decision which sustained the reduction-in-rank appeal and recommended the cancellation of the June 11, 1974, reassignment to Position No. 17610. Thereafter, the agency cancelled the reassignment and amended its records to show the appellant's reassignment from Position No. 18627 to Position No. 19343-S, effective on November 10, 1974.

The appellant filed a classification appeal to the Commission regarding Position No. 19343-S and also appealed to the Federal Employee Appeals Authority, alleging that this reassignment was a reduction in rank. Subsequently, he chose to pursue the reduction-in-rank issue concurrently with an age discrimination complaint through the agency's discrimination complaint procedures.

In mid March 1975, SE experienced another reorganization smaller than the one undertaken in June 1974. It was after the second reorganization that the public remarks attributed to the appellant,

on which the instant adverse action was based, were published.

On July 31, 1975, the Atlanta Regional Office of the Civil Service Commission issued its decision regarding the classification appeal, finding that Position No. 19343-S was properly classified as Supervisory Aerospace Engineer, GS-14. The classification decision is discussed in further detail later in this decision. The discrimination complaint, including the issue of reduction in rank, has not been decided as of the date of this decision.

III. ANALYSIS AND FINDINGS

A. PROCEDURES

Evidence in the record discloses that a written notice dated August 1, 1975, informed the appellant of the reasons for proposing his removal; told him where he might review the material relied on in proposing the action; and advised him of the time limit (15 days, later

extended) within which he might answer the charges both personally and in writing. The record further discloses that, after the appellant submitted written answers dated September 17 and 18, 1975, and made an oral reply on October 6, 1975, he was notified of the decision to effect his change to lower grade, from GS-14 to GS-12, on the basis of the aforementioned charges. The notice of decision, signed by an official at a higher level than the official who proposed the action, was delivered to the appellant prior to its effective date.

The record shows that the appellant was retained in an active duty status at the higher grade during the notice period, although he was detailed to another position.

Section 752.202(a) (1) of the Civil Service Regulations provides, in pertinent part, that an employee against whom adverse action is sought is entitled to at least thirty (30) full days' written notice stating any and all reasons,

specifically and in detail, for the proposed action (emphasis added).

The advance notice in this case reads, in part, as follows:

Charge No. 2

******

(Unnumbered paragraph 5, page 11) The above specifically described conduct has created an environment which has adversely affected this Agency and in particular the George C. Marshall Space Flight Center. Aside from the disreoute you have brought to this Agency and its Management and aside from the loss of public confidence you have caused, your conduct has undermined morale at the George C. Marshall Space Flight Center and brought disharmony and disaffection among fellow employees. (emphasis added)

(b) Mr. Alred P. Warren, team leader in the Auxiliary Equipment Branch, in a statement

newspapers in the presence of Mr. Loy and others in the office. Mr. Bush has told him that his job is a farce.

(e) Mr. Harry Thayer, Auxiliary Equipment Branch, stated to the NASA Regional Inspector that Mr. Bush spends a lot of time on the telephone discussing his desire to leave the organization and attend law school. Mr. Bush discusses the belief he has been demoted and if his job were abolished, he could retire. "I do not believe anyone should be able to have their job abolished to gain a personal benefit."

(f) Mr. Leonard Moore, Auxiliary Equipment Branch, stated to the NASA Regional Inspector: "He wants his job abolished, he has said, so he could go to law school."

Mr. Moore says he believes Mr. Bush's position is needed and is not a falsehood. Mr. Moore further states that he left the room when the TV people came to interview Bush. "I did not approve of

to the NASA Regional Inspector made "reference to the first appearance on local TV by Mr. Bush, commenting that it upset many people because it was distorted." "I was very disturbed about it, he stated, as the program on TV showed Bush sitting at his desk with no papers in sight, he had no telephone, and his briefcase was sitting on a wastebasket. This was distortion, he said."

Mr. Warren further is reported as saying: "This situation surrounding Bush at MSFC, and the adverse newspaper publicity, which is not confined to the Huntsville area, has adversely affected the morale of the entire branch. The TV interviews on site have disrupted the work process, it has become a topic of conversation and has created a disruption of service efficiency."

(c) Mr. Carl Loy, Auxiliary Equipment Branch, stated to the NASA Regional Inspector that Mr. Bush had discussed the articles which appeared in

such a thing so I left. I think this should have been done another way it if needed to be done at all. Mr. Bush should settle his gripes with Management, if he has any."

(g) You did write a letter to the Editor of the Federal Times, November 4, 1974, encouraging other Government employees to dissent and to file appeals and civil suits against the Government. The letter was not only degrading to the appellate process, but was punctuated with inflammatory statements and words such as "FIGHT."

The notice of decision informed the appellant that only those reasons set forth in the decision letter were found sustained and that all other reasons specified in the advance notice were not sustained. Omitted from the decision letter was that part of Charge No. 2 which appears above the first sentence, quoted above. Thus, there is no "specifically described conduct" upon which to

base the conclusion stated in the notice and quoted earlier (underscored portion).

With respect to the remainder of Charge No. 2, beginning with paragraph (b) we find that the advance notice is procedurally defective. Specifically, with respect to the statements referred to in paragraph (b) through (f), the advance notice fails to provide the appellant such information as when the statements were made, the circumstances under which they were made, to whom they were made, and the context in which they were made. Also, the statements which merely quote comments of the appellant do not support the charge that morale has been undermined or that the appellant brought disharmony and disaffection among fellow employees. Further, the remaining statements are no more than conclusions, and do not, in themselves, support the charge of bringing disharmony and disaffection among fellow employees.

As for the letter cited in paragraph (g), even if the facts asserted are assumed to be true, they are insufficient to support the charge.

Based on the foregoing, we conclude that Charge No. 2 of the advance notice is fatally procedurally defective. Accordingly, no further consideration will be given to this charge.

With respect to Charge No. 1, the notice of decision reads, in part, as follows:

> 1. You did on more than one occasion publicly make remarks which were misleading and often false . . .

While the advance notice specifically identifies those statements which are considered false, the notice of decision makes no finding with respect to the falsity of the statements, except in the general terms quoted above. Since the decision letter contains no findings with respect to which of the statements the agency considered to be

false, we have considered the charges found sustained by the agency only in the light of whether the evidence supports a conclusion that such statements were misleading.

The appellant contends, in effect, that the entire action is defective because the decision letter makes no finding that the demotion will promote the efficiency of the service. However, there is no requirement that an agency include such a statement in the decision letter.

The appellant further contends that the deciding official, Mr. William R. Lucas, Director, MSFC, had prejudged his case and failed to give sufficient consideration to the appellant's written and oral replies. In this respect, he referred to a statement made by Mr. Lucas during an interview with a local television reporter that, "Mr. Bush has made certain statements to the effect that he does not have meaningful work to do. I have had that statement investigated and I can say unequivocally that such a statement has no basis

in fact." The statement was televised sometime after June 25, 1976.

The record shows that the charges are not limited to public statements relating to whether the appellant had meaningful work to do, but include charges as to other public statements, as well as charges with respect to the appellant's intentions in making such statements. Thus, the fact that Mr. Lucas considered one of the statements to be without basis does not support a conclusion that he had prejudged the case. Furthermore, the record discloses that after the appellant's written and oral replies were received, Mr. Lucas found some of the charges not sustained and also reduced the proposed penalty from separation to a two-grade demotion. In these circumstances, we find that Mr. Lucas did not prejudge the appellant's case.

The appellant also contends that he was not afforded a meaningful opportunity to answer personally to the charges, in that the oral reply

officer did not participate in any discussion with him. In support of his contention, he cited Ricucci v. United States, 425 F.2d 1252 (Ct.Cl. 1970).

The agency representative pointed out that essentially the same contention as raised by the appellant was rejected by the court in Grover v. United States, 200 Ct.Cl.337 (1973).

Section 752.202(b) of the Civil Service Regulations provides, in pertinent part, that, "The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made."

In the instant case, the evidence shows that the oral reply officer named in the advance notice is Mr. J. E. Kingsbury, Director, SE, who also proposed the adverse action. The oral reply session was attended by the appellant's representative,

the appellant, Mr. Kingsbury, and the deciding official, Mr. William R. Lucas. A transcript of the oral reply session does not reflect that either Mr. Lucas or Mr. Kingsbury engaged in any discussion with the appellant during his presentation of the oral reply, although several off-the-record discussions are noted. The transcript reflects that the appellant was informed at the outset that no questions would be asked or answered.

In Grover, the court held that an effective oral reply does not necessarily require a dialogue between the oral reply officer and the employee if the officer is in the direct line of management authority superior to the employee and is authorized to make a final recommendation. In the case at hand, Mr. Kingsbury satisfied that requirement. Furthermore, the deciding official was present during this session and was provided with a verbatim transcript of the response. On these facts, we find no impropriety with respect

to the personal reply procedures followed in this appellant's case. Moreover, the Commission's regulations do not preclude the official who proposed the action from serving as the official designated to receive the appellant's written and oral answers.

Without further specifying, the appellant further contends that the deciding official actually punished the appellant for certain charges which he found not sustained (written statements to members of Congress). In this respect, the notice of decision sets forth clearly those charges found sustained and states, "All other reasons specified in the Notice of Proposed Removal are not sustained and were not considered in reaching the final decision." Our examination of the record disclosed no evidence to the contrary; therefore, we find no procedural irregularity with respect to this matter.

The appellant also raised an issue that the agency failed to follow its regulations governing the development of evidence of all pertinent facts.

Presumably, these contentions relate to agency regulations governing pre-action investigations. In this respect, the Commission, upon appeal, will consider allegations that an agency did not follow its own procedural regulations governing adverse actions; however, the review is limited to regulations which afford the employee against whom adverse action is being effected procedural safeguards in addition to those provided by Part 752 of the Civil Service Regulations. We do not review regulations relating to pre-action investigations.

In light of the foregoing, and after a careful review of the record, we find that the procedures followed in effecting the adverse action in this appellant's case complied with the Civil Service Regulations.

B. MERITS - SUFFICIENCY OF THE REASONS

Charge No. 1 of the demotion action has three specifications. The first specification to charge

one accuses the appellant of publicly making misleading remarks which generated an environment of sensationalism demeaning to the Government, NASA, and personnel of MSFC, thereby impeding Government efficiency and economy and adversely affecting public confidence in the Government Service. The statements attributed to the appellant are contained in an article dated May 15, 1975, which appeared in the Huntsville Times, and served as the basis for a May 17, 1975, national press release published in the Seattle Post-Intelligencer, Birmingham Post-Herald, Washington Star, and Buffalo Evening News; in a letter dated June 6, 1975, to a reporter for the Washington Post; and in a National Enquirer article on July 29, 1975. The record includes documentation of the remarks attributed to the appellant, including copies of the news articles referred to and a copy of the letter dated June 6, 1975.

The appellant does not take issue with the substance of the remarks. Rather, he claims

that, while the remarks reflect hyperbole and exaggeration, they do have a basis in fact. He contends that, since he was unsuccessful in his attempts to get the agency to abolish what he believed to be a useless job and to place him in a more productive job, or in the alternative to abolish his job and allow him to retire, he was justified in bringing this matter to public attention through the news media. On the other hand, the agency argues that the remarks are misleading, and were made by the appellant for the purpose of getting his job abolished, thereby permitting him to receive early retirement. The agency's contention that the remarks were designed by the appellant to assist him in getting his job abolished constitute the basis for one of the specifications to the first charge and will be discussed later in this decision.

The substance of the statements charged in the first specification is that the appellant's position (No. 19343-S) was written improperly

"to support the GS-15 Branch Chief" and was a "falsehood, a travesty and worthless"; that he was not the only one who had a grossly inaccurate job description; that he had not been told who to supervise and did not know what their jobs were; that his job was worthless and no one seemed to care; that his complaints about his job were unsuccessful; and that management told him, in effect to keep his mouth shut. Also, the appellant is attributed with having made statements to the effect that personal records had been removed from his desk; that he had been placed in charge of housekeeping for his group; that he had no telephone for eleven months; and that MSFC had lost its design and analysis capability and had become a contract-monitoring entity.

There is a mass of evidence, both documentary and testimonial, in the record with respect to the appellant's position. It was the subject of a classification appeal filed by the appellant, in which he made some of the statements subsequently

attributed to him in the news articles. The appellant contends that Mr. Frank Colvin, a Civil Service Commission Classification Specialist of the Atlanta Regional Office, who conducted a desk audit of the position in connection with his appeal, commented in the presence of Mr. Charles Faulkner, the appellant's immediate supervisor, that the appellant's statements regarding his job were true. Mr. Colvin is also said to have questioned why Mr. Faulkner had certified that the position description was accurate when, in fact, that was not the case.

We find, however, that the classification appeal decision, issued by classification experts of the Civil Service Commission with final classification authority, is dispositive of the issue concerning the validity of the appellant's position. The decision also reflects the facts obtained by Mr. Colvin during the on-site audit referred to by the appellant. It reads, in pertinent part, as follows:

Our examination of your case has confirmed several of the allegations made in your appeal. It is apparent, for example, that from November 10, 1974 (when you were assigned to this position), until March 16, 1975, the organizational structure necessary to provide you with employees to supervise had not been officially implemented. It also appears that, until as late as April 21, 1975, the employees whom you were to supervise may not have been officially identified to you (emphasis added). That is to say, there is a record that your supervisor had a meeting with you on that date, in response to the appeal you had just filed, for the express purpose of officially explaining your assigned duties and responsibilities, including identifying your subordinates to you and you to them. At the time of our on-site audit (July 14, 1975), personnel records revealed that one GS-13 employee presumably under your supervision

had not yet officially been assigned to your branch (a request for official personnel action to accomplish that assignment, however, was then being processed).

After an analysis of the duties and responsibilities of the position, as set forth in the official position description, the classification evaluation concluded:

> On the basis of this evaluation, we have determined that your position (number 19343-S) is properly classified as Supervisory Aerospace Engineer, GS-861-14. Continued justification of that grade, however, depends on the realization of a projected responsibility for technical supervision of a minimum of two GS-13 positions (including either Mr. Loy's or an additional GS-13 position). We are therefore directing your agency to audit and report to us on that aspect of your position six months after the date of this

decision.

The agency furnished documentary evidence of its compliance with the audit and report requirements.

Although the appellant initially stated that he did not know who his subordinates were at the time he made the remarks attributed to him in the advance notice, he subsequently acknowledged that he saw an organizational chart on Mr. Loy's desk in February, 1975, which described the organization to become effective on March 17, 1975, and called for him to be the supervisor of five people identified on that chart. Also, the appellant admitted in the classification appeal letter that he had learned the second week of March 1975, who his subordinates were.

The record includes extensive testimony from the appellant, his fellow employees and his supervisors as to the amount of work actually performed by the appellant while serving in the position. The question, however, is not what work the appellant

did, but what was specified in the position description and what was available for him to do. The appellant acknowledged that he never informed Mr. Charles Faulkner, his supervisor, from March 1975, that he did not know who he was to supervise or that he had insufficient work to do. Mr. J. O. Lysaght, the appellant's immediate supervisor until March 1975, stated that there was plenty of work for the appellant to do and that the appellant did not tell him that he did not have enough productive work to do or that his position was worthless (T.86-92). Furthermore, Mr. Gustav Kroll, the appellant's second level supervisor, stated that the appellant did not come to him with any dissatisfaction about his job (T.140).

We conclude that the evidence clearly shows that the appellant's position was not false or worthless. Further, the evidence, as discussed above, shows that at the time of his interviews with reporters from the Huntsville Times and the National Enquirer, the appellant did not have a

grossly inaccurate position description. And, while the evidence shows that a number of positions established in the June 1974, reorganization were classified one grade higher than could be supported by the agency, that alone does not support a conclusion that these position descriptions were grossly inaccurate. Moreover, the testimony of the appellant and his fellow employees, Mr. Robert Louis (sic), Mr. Leonard Householder, and Mr. Jerry Cox, do not support the appellant's statement regarding other grossly inaccurate position descriptions. Their testimony reveals that some employees were dissatisfied with the assignment given them in the reorganization; not because of grossly inaccurate position descriptions, but because they were placed in positions they believed to be inconsistent with their background and training. However, the evidence establishes that in the reorganization and retrenchment of June 1974 employees received assignments that were available in the new organization.

There is no evidence in the record on which to base a conclusion that anyone in management told the appellant to keep his mouth shut or used words to convey a message to that effect to him, despite the appellant's contention that Mr. Adrian Clark did so. Mr. Clark is said to have told the appellant that Clark's supervisor threatened to take Clark's supervisory position from him.

A careful review of the record fails to disclose any evidence that the appellant's statement concerning removal of personal records from his desk is misleading. The testimony of Mr. Harry Thayer, a former subordinate of the appellant, that the appellant "kept his file locked" (T.568), is inadequate to support such a conclusion. The same is true of the testimony of the appellant's superiors, Messrs. Kroll and McCool, that the appellant never reported the matter to them (T.141,187). No other evidence was presented.

As for the statements attributed to him concerning housekeeping, the appellant claimed to have said,

"I am alternate housekeeper for Room 4035," rather than the statement he is charged with having made (Written Reply, 9). The record does show that this assignment carried with it responsibilities for safety and security, but did not include custodial duties (T.90,186). Moreover, Mr. Robert E. Garrett, who succeeded the appellant in Position No. 19343-S, said that he had performed so-called housekeeping functions involving safety and security after he took the position (T.214-215). The appellant argued that the remarks he made did not imply that he was expected to perform custodial duties. Nevertheless, the tenor of the appellant's comment and the context in which it was made, leads us to the conclusion that the appellant was attempting to depict himself as a custodian, and that he tailored his statement accordingly.

In his oral reply (Page 8), the appellant reiterated that he did not, in fact, have a telephone for eleven months. In this regard, the record shows that there were three telephones in

the room where his desk was located; that he did not request a telephone or mention his lack of one; that it was normal practice for a supervisory employee to initiate requests for telephones; and that the appellant did not do so (T.91,140,185,692). Mr. Garrett testified that when he took the job, he submitted a request and got a telephone installed (T.213).

The advance notice and the notice of decision reflect that the appellant's statement regarding loss of design and analysis capability was made in a letter to a reporter of the Washington Post, and there is no evidence that it received further publication. The appellant stated that he asked that the letter not be published. Accordingly, we find no impropriety with respect to this matter.

After an exhaustive examination of the evidence and careful consideration of the circumstances surrounding the interviews which produced the statements at issue in this case, we hold that the tenor of the appellant's statements, the language

used, the context in which they were made, the publications in which they appeared, and the national notoriety they received, support a finding that, with the exceptions discussed more fully earlier in this analysis, the statements were misleading; that they generated an environment of sensationalism demeaning to the government, the agency, and its personnel at MSFC, and that they impeded government efficiency and economy and adversely affected public confidence in the government service.

The second specification of the first charge concerns letters written by citizens throughout the nation in response to newspaper articles reporting the appellant's comments to a reporter of the Huntsville Times. The agency charges that the letters are proof that the appellant's published comments have generated disrespect and loss of confidence for government service and loss of confidence in NASA. One letter, dated June 11, 1975, is quoted, as follows:

> In reading this article I only confirm my thoughts that it is the flagrant spending of Congress that is causing such inflation and imbalance of our economy. *** I find it very hard to place any trust in our government, when in time of peace that they (sic) cannot operate on a balanced budget.

Another reference is to a letter from a resident of Decatur, Alabama, said to commend the appellant for taking the actions referred to in an article appearing in the Birmingham Post-Herald, and to the appellant's response to that letter. The appellant's response is quoted as stating that he is "...appalled at the illegalities that are rampant on the Arsenal" and "(I) predict the scenario will be a repeat of a page from Watergate - STONEWALL IT." The appellant is said to admit to the disharmony he had created among fellow workers by stating that

The specification also cites three letters said to indicate that the appellant's comments had created among the public an absolute belief that the Government would save thousands of dollars per year if Position No. 19343-S were abolished.

Copies of the letters cited in the specification are a part of the record in this case and the appellant acknowledged that the letters were written in response to published comments he had made to the Huntsville Times reporter. The appellant stated that the illegalities referred to in his letter concerned violations of laws and regulations governing Government personnel and that the term "Stonewalling" was appropriate, as it meant, "burying the facts." He contended that the writers' motives were not reflected in the quoted parts of the letters in response to his public statements; and that the letters cited as indicating absolute belief that the government would save money did not reflect such belief. The appellant pointed out that, in two instances, the

letters were actually soliciting money from him.

One of these letters, from Glen Rock, Pennsylvania, states:

> I honor you for saying you get too much money. I don't think anyone is worth that much money but if I were you I would take it and distribute it to people that need it. God will bless you.

Another of the letters begins, "Well, Praises Be! we've found an honest man!" The third letter, from a retired Lieutenant Colonel, praises the appellant for his action as does the letter to which the appellant responded, as quoted in the specification.

The content of the letters cited in the second specification clearly indicates that the writers were responding to the appellant's statements reported in the media. Furthermore, an examination of the letters discloses that the writers

these facts, and in view of the nature of the appellant's comments, we hold that belief in the appellant's comments, as manifested in the letters cited, reflects that the appellant's statements did generate disrespect for and loss of confidence in the Government and NASA.

The third specification accuses the appellant of making statements which appeared to the general public to be honorable and motivated by public interest, but which were actually motivated by the appellant's desire to have his position abolished for the personal benefit of being able to take early retirement and enter law school. The agency charges that the appellant's statements (e.g., "All I want is viable employment") misled the public, causing unwarranted criticism of NASA. This specification cites memoranda of March 18 and 25, 1975, from the appellant to Mr. C. H. Shelton with respect to the abolishment of the appellant's position and his interest in entering law school; a letter to the appellant dated December 10, 1974,

accepting his application for admission to law school beginning August 26, 1975; and conversations with the Structures and Propulsion Laboratory Director and the MSFC Retirement Coordinator regarding retirement.

The facts set forth in the specification are documented. The appellant acknowledged that he sought to have his position abolished, but that law school was only one of the alternatives which he considered. He said that the idea of serving less than 30 years never crossed his mind until August 1974, (Written Answer,16) and that, although there was a period of eligibility for discontinued service retirement which ended in late February 1975, he did not become eligible for retirement until February 11, 1975, and was not sure then that he was eligible.

As noted earlier, the record shows that the appellant was assigned to a valid position and that there was work available for him to perform.

Given these facts, and the appellant's expressed frustration in resolving his alleged grievances with the agency, a reasonable inference is that his statements were motivated by self-interest, rather than an altruistic interest in the economy and efficiency of the service.

In summary, the preponderance of the evidence supports a finding that the three specifications to Charge No. 1 are sustained.

Finally, the appellant asserted that the agency's action was an encroachment on his constitutionally protected right to freedom of speech. In this regard, he acknowledged that government employees do not have unlimited freedom to make public remarks critical of the agencies that employ them. Nevertheless, he maintained that his statements were entitled to first amendment protection because they addressed matters of legitimate public concern, and because the agency has failed to prove malice on his part. The appellant also pointed out that no one in a position of authority

with the agency notified him not to communicate with the press and general public.

Both the appellant and the agency submitted extensive briefs concerning the alleged infringement of the appellant's first amendment rights. The briefs submitted by the parties, which set forth legal authority and argument, have been considered in reaching the decision in this case.

After a thorough analysis of applicable legal authority, and after an exhaustive examination of the entire record, we conclude that the appellant's public remarks exceeded the bounds of expression protected by the first amendment. Our conclusion in this respect is based on three crucial factors. First, the appellant's statements stemmed, not from public interest, but from his desire to have his position abolished. Second, the statements were misleading; they conveyed the erroneous impression that the agency was deliberately wasting public funds, thus discrediting the agency and its employees. Third, there was no legitimate

public interest to be served by abolishing the appellant's position. The record shows that the duties of his position remained to be performed, regardless of whether the appellant's position was in existence or not. For this reason, abolishment of the appellant's position would have produced no savings to the government.

Clearly, the law affords federal employees first amendment protection so that they can be free to take what they believe to be appropriate measures to safeguard the interest of the public they serve. Nevertheless, as happened in the present case, when an employee makes unwarranted public remarks critical of his agency for reasons of self-interest, such protection is no longer available to him.

As for the appellant's claim that he was never instructed not to communicate with the press or public, we note that the agency's concern in this case was with the substance of the appellant's interviews, not with the fact that he granted

interviews. Furthermore, it was the responsibility of the appellant, not the agency, to exercise prudent judgment to determine whether the comments were proper and within the protection of the first amendment.

The notice of decision informed the appellant that he would not be entitled to salary retention under Part 531 of the Civil Service Regulations. The appellant contends that salary retention is appropriate in his case. Subpart E, Part 531 of the Civil Service Regulations governs salary retention for general schedule employees who are demoted from one general schedule grade to another. Section 531.502 sets forth the mandatory requirements for eligibility for salary retention. One such requirement is that the demotion may not be for personal cause. As pointed out in Subchapter 5, Chapter 531 of the Federal Personnel Manual, personal cause includes demotions based on the conduct of the employee. Accordingly, we find that the appellant was demoted for personal cause

and, therefore, is not entitled to salary retention.

IV. CONCLUSION

Evidence in the record, as discussed above, sustains the three specifications to Charge No. 1.

As explained more fully in the body of the decision, Charge No. 2 was found to be procedurally defective.

In our view, the sustained charge is sufficient to warrant the penalty imposed in this appellant's case. An exhaustive review of the record fails to reveal evidence of circumstances in mitigation or extenuation sufficient to warrant a conclusion that the penalty imposed is arbitrary, unreasonable, or capricious; hence, we find that the removal [sic] action is for such cause as will promote the efficiency of the service. In reaching this conclusion, careful consideration was given to the agency's regulations governing

discipline, and particularly Section 7.404 dealing with penalties to be imposed on an employee. We find that the action taken in this case is in accord with the standard established in the section cited.

V. DECISION

The change-to-lower-grade action is affirmed.

Civil Service Regulation 772.309(b) provides that decisions of the Federal Employee Appeals Authority are final and that there is no further right of administrative appeal.

For the Commission:

IRA R. HARRISON
Appeals Officer

APPENDIX F

UNITED STATES CIVIL SERVICE COMMISSION

APPEALS REVIEW BOARD

WASHINGTON, D.C., 20415

In Reply Please Refer to
ARB:clw
July 14, 1978

Mr. Harvey Elrod
Huston, Elrod, Edwards & Belser
P.O. Box 632
Decatur, Alabama 35601

BEFORE: Member Cohen -- Reverse
Member Palmquist -- Reverse
Member Tillman -- Reverse
By Unanimous Decision -- Reverse

Dear Mr. Elrod:

This is in further response to your request that the Board reopen and reconsider the August 12, 1976 decision of the Atlanta Field Office, Federal Employee Appeals Authority (FEAA), in the matter of William C. Busn (the appellant), which affirmed the action of the National Aeronautics and Space Administration (NASA) in demoting him

from the position of Supervisory Aerospace Engineer, GS-14, to Aerospace Engineer, GS-12, at the Marshall Space Flight Center (MSFC), Alabama, effective November 30, 1975. By decision of March 10, 1978, the Board granted your request and reopened the case. Thereafter, a copy of the material submitted in support of the request was transmitted to the agency, and a copy of its response of April 27, 1978, has been submitted to you. This is the Board's decision on reconsideration of the case.

The record shows that appellant's removal was proposed by the Director, Science and Engineering, MSFC, on August 1, 1975, on the basis of two charges. Charge 1 reads as follows:

> 1. You did on more than one occasion publicly make intemperate remarks which were misleading and often false, evidencing a malicious attitude towards Management and generating an environment of sensationalism demeaning to the

Government, the National Aeronautics and Space Administration and the personnel of the George C. Marshall Space Flight Center, thereby impeding Government efficiency and economy and adversely affecting public confidence in the Government service, to wit:

There followed eight pages of specifications detailing appellant's statements and conduct. In addition, the advance notice contained a second charge, but portions of it were not relied on by the final agency decision and the remainder was found to be procedurally improper by the Field Office, so the entire charge is no longer relevent to the Board's reconsideration of this case. After submitting written and oral responses, appellant was informed by letter of November 25, 1975, of those portions of the advance notice which were found sustained by the agency decision. The decision, issued by the Director, MSFC, found that, although the sustained reasons were

sufficient to warrant his removal, because of the fact that this was appellant's first offense, it had been decided to reduce the penalty to the demotion referenced above

Appellant submitted an appeal to the Atlanta Field Office and on June 8, 9, and 10, 1976, a hearing was held at his request. In its decision of August 12, 1976, the Field Office found, as noted above, that charge 2 was procedurally defective. It also found that the agency had made no specific findings as to the allegation that appellant's statements were false, so that the charge would only be examined insofar as it alleged that they were misleading; that the allegations of procedural error, concerning the propriety of the oral reply and the deciding official's involvement in the case, were not sustained; that the contentions relative to the agency's investigation of the matter would not be examined because the investigation pre-dated the initiation of the adverse action; that, with the exception of a few points, specification 1 of

charge 1, the charge that appellant made misleading remarks which were demeaning to the agency and thereby impeded Government efficiency and adversely affected public confidence in the Government service, was sustained; that specification 2, alleging the loss of confidence and respect caused by appellant's remarks, as shown by letters written by citizens throughout the nation, was sustained; and that specification 3, that appellant made statements which appeared to be honorable, but were actually motivated by self-interest, was sustained. On the basis of the three sustained specifications, the Field Office concluded that the charge was sustained. It is also determined that the statements cited in the charge exceeded the bounds of protection afforded by the First Amendment because they stemmed from appellant's desire to have his position abolished, rather than from the public interest; because they were misleading; and because there was no legitimate public interest to be served by having appellant's position abolished. On the basis of these

findings, the Field Office concluded that the demotion was taken for such cause as would promote the efficiency of the service and it was affirmed.

You submitted a request for reopening of the Field Office decision on November 7, 1977, which enclosed five exhibits which you contend constitute new and material evidence. The bulk of the submission was an extensive exposition of your contention that the Field Office decision involved numerous misinterpretation of law, concerning Fifth Amendment due process rights and freedom of speech guaranteed by the First Amendment, and would serve to set an improper precedent with respect to these issues. The agency's April 27, 1978 response contains its representations in opposition to each of your major contentions and in support of the conclusions reached by the Field Office.

The five exhibits attached to the request for reopening are NASA Policy Directive 1380.4, dated December 27, 1968, the decision of the U.S. District Court in the case of Lodge 1858, American

Federation of Government Employees v. NASA, two Comptroller General reports, dated January 16, 1976, and May 4, 1977, and NASA Instruction 1130.8 of January 16, 1969. The Board finds that none of these submissions constitutes new and material evidence which was not readily available prior to the issuance of the Field Office decision. The agency issuances and one of the Comptroller General reports, as seen by their dates, were available at earlier dates. Further, we find that none of the exhibits is relevant to the matters before the Board. First, the District Court decision was reversed on appeal by the U.S. Court of Appeals, District of Columbia Circuit on March 20, 1978. Policy Directive 1380.4 adds nothing to the case because it provides only for the "appropriate" dissemination of information and does not set a policy which would determine the outcome of a case such as this. In addition, we find that the Comptroller General reports contain no evidence relating to the specific issues of the case, especially since the charge based on appellant's

statement that MSFC had become a contract monitoring organization, is not one which still remains for decision. Finally, in addition to its age, Instruction 1130.8 does not meet the requisite criterion because it concerns the matter of the pre-action investigation of the case and, for the reasons set forth in the Field Office decision, is not relevant to the matters before the Civil Service Commission. Therefore, the Board will give no further consideration to these exhibits.

With respect to the charge that the Field Office decision violated appellant's due process rights afforded by the Fifth Amendment, the arguments in this regard concern the adequacy of the oral reply to the notice of proposed adverse action, the alleged prejudice of the deciding official, the denial of the request for the appearance of certain witnesses at the FEAA hearing, the alleged improper application of a standard of proof by the Appeals Officer, and the alleged personal bias of the Appeals Officer.

You contend that the oral reply was unfair because the official to whom appellant responded did not provide a dialogue on the issues raised in the response, and that, under the standards set by the Court of Claims in the case of Ricucci v. United States, 425 F.2d 1252 (1970), this provided him with an incomplete opportunity to refute the charges. Based upon our review of the evidence bearing on this matter, while we find merit to the contention concerning Ricucci, we concur in the Field Office's ultimate finding, because we agree that the Court of Claims set clear limits on the Ricucci rationale in deciding Grover v. United States, 200 Ct. Cl. 337 (1973), and that the oral reply afforded appellant in this case comports with the requirements set forth in the latter decision. Accordingly for the reasons stated by the Field Office, we find no violation of appellant's right to due process in this particular.

The argument concerning the deciding official is that he did not give fair consideration to the charges and appellant's response thereto, because he had already made a public statement that appellant's statements had been investigated and found to be untrue. In this regard, the Board finds that the official's statement concerned only one of the statements referenced in the letter of charges and we note that the Field Office confirmed the official's statement by finding that the statement by appellant, to which the response referred, was misleading. Further, we do not believe that all prior involvement by an agency official in the normal course of his/her duties disqualifies him/her from serving as a deciding official when an adverse action is proposed. The determinative factor is whether or not, irrespective of his/her prior familiarity with the case, the official gave full and fair consideration to the charges and the employee's response. In the instant case, the official found certain portions of the charges sustained and exercised his discretion by effecting

a change to lower grade, rather than the proposed removal action, as the proper penalty. Under the circumstances of this case, we concur in the Appeals Officer's determination that the record does not support the allegation that appellant was denied his right to due process in this regard.

The third of these issues is that the Appeals Officer improperly denied appellant's request for the appearance of certain witnesses who were employees of the agency. The Board finds that, insofar as the requests concerned those persons involved with the investigation of the charges which led to the adverse action, the Appeals Officer properly found that the testimony of such witnesses was irrelevant to the case. The adverse action must be judged by the evidence adduced concerning its merits, and an employee must be given the opportunity to confront and cross-examine his "accusers," as we find was done in this case. We find that the Appeals

Officer's actions in this regard were in accordance with the requirements of section 772.307 of the Civil Service Regulations, and specifically, the direction in subsection (c)(3) thereof to "exclude irrelevant or unduly repetitious testimony."

Your fourth contention is that the Appeals Officer applied an improper standard by concluding that the adverse action could be sustained on the basis of a finding that it was supported by a preponderance of the evidence. The Board finds no error in this regard. We have reviewed the case you cite in support of this contention and note that it found such a standard appropriate, in large part, because the case involved the issue of fraud. Such an issue is not involved in the instant case. Further, Civil Service Commission policy requires application of the standard applied by the FEAA, and this standard has been judicially approved in numerous instances as appropriate to the administrative proceedings before the Commission, even in cases involving allegations of criminal conduct,

where the requisite standard in a similar court case would be proof beyond a reasonable doubt. See, for example, Universal Camera Corp. v. NLRB, 71 S. Ct. 456 (1951), Carr v. United States, 337 F. Supp. 1172 (1972), and Finfer v. Caplin, 334 F.2d 38 (2d Cir 1965), cert. denied sub nom. Finfer v. Cohen, 382 U.S. 883 (1965). Accordingly, we find no due process violation in this respect.

The final contention raised under the Fifth Amendment is that the Appeals Officer held a personal bias against appellant. Based upon our review of the record, we find no evidence to support this allegation. We note that the Appeals Officer dismissed the entirety of charge 2 and we find no evidence from a review of the FEAA decision or the relevant portions of the record to support a charge of animus by the Appeals Officer. While it is true that his ultimate conclusion was contrary to appellant's position on the merits of the case against him, that fact alone does not give credence to the bare allegation of bias.

The Board next turns its attention to the First Amendment allegations raised in the request for reopening. When the case was reopened, it appeared that appellant had raised to the Board a substantial argument challenging the validity of the Field Office decision because of its lack of a full analysis of this matter in line with the Supreme Court's "balancing test," which is to be applied to such issues. Accordingly, the Board will attempt to complete such an analysis. However, it should be noted that in its review of the legal principles bearing on this particular issue, the Board otherwise will not review the Field Office determinations concerning the merits of the specifications and charges. That is to say, the matter of whether the allegations of factual occurrences set forth in the charges are sustained will not be reviewed by the Board in this adjudication, inasmuch as, absent the submission of new and material evidence, the Board does not reopen cases in order to relitigate the facts involved or to re-evaluate the evidence concerning those factual issues and,

thus, to substitute its judgment for that of the Appeals Officer on those matters. As noted above, we have found that the five exhibits to the request to reopen do not contain such evidence.

The point of departure in the Board's analysis, and also the benchmark by which the final decision on the applicability of the First Amendment must be measured, is the Supreme Court decision in Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968), in which the Court stated that a balance must be arrived at between the interests of the employee as a citizen, on commenting on matters of public concern, and those of the employer in promoting the efficiency of the services it performs. Starting from the premise that a surrender of Constitutional rights, such as freedom of speech, could not be the price of public employment, the Court recognized certain factors which might, nevertheless, be countervailing in the balance. As cited in Donohue v. Staunton, 471 F.2d 475 (7th Cir 1972), cert. denied, 93 S.Ct.

1419 (1973), they are: whether the statements interfered with the maintenance of discipline or harmony; whether the position requires personal loyalty or confidentiality between employer and employee; whether the employee speaks with greater access to the real facts; whether the statements impede the employee's proper performance; and whether they were so without foundation as to call his/her competence into question. In Pickering, there had been no showing that any adverse reaction had been caused by the employee's statements, and the Court concluded that:

> In sum, we hold that in a case such as this, absent proof of false statements recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. 391 U.S. at 574.

In reaching this conclusion, the Court applied the standard of "malice" set out in New York Times v. Sullivan, 376 U.S. 254 (1964). As recognized in St. Amant v. Thompson, 88 S.Ct. 1323 (1968):

> . . . reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, and there must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication. 88 S. Ct. at 1325."

Therefore, absent "a high degree of awareness of * * * probable falsity," Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209 (1964), in the statements made, a finding of malice cannot attach.

The Board has reviewed the evidence of record in this light and finds that, while appellant has admitted to a certain amount of exaggeration, the evidence is insufficient to sustain a conclusion that his statements were actuated by "malice," as that term has been judicially defined. We have considered the Field Office's reliance on the evidence tending to indicate that appellant's

motive may have been his personal gain, rather than the public benefit, but find that, even if true, this would not call for a finding that the statements were made with malice. The Board also notes that appellant made his public statements concerning the validity of his position and other related and unrelated matters after filing an appeal of the classification of his position with the Civil Service Commission, and without waiting for the decision to be issued on the appeal. While we do not condone his precipitous action and hastiness in seeking public exposure, we do not find that this factor, either, suffices to show malice. In this regard, the record shows that the criticism appellant leveled at the agency concerning his own position was found, in the classification appeal decision, to be unsupported as to its extent, but that the decision did confirm that the potential of the position had not been fully realized for several months after appellant's assignment to it.

Having found that appellant's statements were not motivated by malice, we note at this point also that the Field Office found that the agency had not made specific findings that any of the appellant's statements were false, and in accordance with this, it only examined these statements to determine if they were "misleading," rather than false.

With this in mind, the only question for resolution is how weighty the various countervailing factors, cited in Pickering, are in this case. In reaching our conclusions, the Board has surveyed cases involving this issue as relevant indicia of the weight accorded to the various factors. Meehan v. Macy, 392 F.2d 882 (DC Cir.1968), decided without reference to Pickering, found no violation of the employee's Constitutional rights when he was discharged for publishing a derogatory poem concerning a plan his agency was considering implementing in the Canal Zone. In this case, the court noted that the possible consequences of the

publication included "rioting," "disharmony, inefficiency, dissension, and even chaos." In Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633 (1974), the Court did not specifically reach the issue, but noted that, "that public speech which improperly damages and impairs the reputation and efficiency of the employing agency," 416 U.S. at 162 and 94 S.Ct. at 1642, is prescribed [sic]. It stated that, if the charges were sustained, charges which referred to the employee's statements that agency officials had accepted bribes and failed to perform their duties, no Constitutional violation would occur. Further, in Lefcourt v. The Legal Aid Society, 312 F. Supp 1105 (1970), aff'd 445 F.2d 1150 (2d Cir 1971), the court found that the requisite personal, confidential relationship in the position held by an attorney for the defendant Legal Aid Society. It also found that interrelationships among the employees had become "personality conflicts" because of the statements. In distinguishing Pickering, the court noted that it involved

public debate, whereas the case before it involved only internal, private debate.

Among the cases finding a Constitutional violation is Donahue v. Staunton, supra, wherein a hospital chaplain published scathing charges about the care received by the hospital patients, which the court found "exaggerated." In reaching its conclusion, the court found, regardless of these remarks, that the employee's duties had not been interfered with, that there was no personal relationship requiring confidentiality, and that the employer apparently was not hindered in responding to the charges because of the added credibility of a priest or one who was intimately associated with the matters about which he had written.

Mt. Healthy City School District Board of Education v. Doyle, 97 S. Ct. 568 (1977), involved a teacher's call to a radio station concerning a proposed teacher dress code.

Once again, although the teacher would have had "presumed greater access to the real facts,"

Pickering, supra, the Court concluded that his failure to be granted tenure, if due to his speech, would be constitutionally impermissible. Relative to the confidential relationship test, the court in Hostrop v. Board of Junior College District Number 515, 471 F.2d 488 (7th Cir 1972), found no such personal relationship required in the work of a college president and the Board of the college. One further case we note is Tygrett v. Washington, 543 F.2d 840 (D.C. Cir 1974), wherein a probationary police officer advocated a "blue flu" in a proposed pay raise did not become effective. The Court of Appeals noted that the crucial question was whether the remarks "actually impinged on qualities making for an effective police force in such a manner as to imperil its efficiency," 543 F.2d at 848, that the Government had the burden of proof on this issue, and that:

> Governmental action affecting fundamental rights does not enjoy a presumption of constitutionality; rather, the burden is

upon the Government to show a compelling governmental interest justifying the intrusion. 543 F.2d 849.

Having carefully considered judicial precedent, the Board concludes that the balance in the instant case weighs in favor of appellant. We have reviewed the considerable testimony devoted toward showing an impairment of efficiency and find that, while it does indicate a certain disruption of the orderly day-to-day routine of the agency, largely caused by the discussions engendered about the statements, it does not prove an actual lessening of efficiency by the agency in accomplishing its mission or substantial disharmony among co-workers sufficient, in the Board's view, to weigh significantly in the balance. The nature of the relationship between appellant and his supervisors would seem to be no more confidential than that of the college president in Hostrop or the chaplain in Donahue. Further, while the view of the public as to appellant's access to the relevant facts

would tend to be high by virtue of his position, the Board cannot say that this access would be greater than that evidenced in Donahue and, perhaps, Mt. Healthy. As to the final test, whether the employee's competence is called into question because his/her statements were so without foundation, the Board refers to the finding in the appellant's classification appeal decision, noted above, and finds that this, too, does not support an infringement on his right of speech. We note, as well, that appellant's statements were to the effect that he had little productive work to do, and that this might be indicative of a lessening of his personal efficiency. However, the agency apparently has not taken issue with appellant's efficiency, as it did not charge him with inefficiency and did not refute his counsel's statements as to his competence.

The factors considered on the other side of the balance include appellant's interest in free speech, as well as the societal interests cited

by appellant in the request for reopening. Such interests include a right to disclosure of information about how tax dollars are spent and about the functioning of government apparatus, an interest in the promotion of the efficiency of the government, and in the maintenance of an atmosphere of freedom of expression by the scientists and engineers who are responsible for the planning and implementation of the nation's space program. While the agency's, and society's, interest in the effective functioning of that program is no less great, we find that, because appellant's statements were not wholly without truth, they properly stimulated public debate. In this case, the nature or extent of proven disruption to the agency's operation, in the Board's view, does not justify abrogation of the exercise of free speech.

Accordingly, the Board hereby reverses the August 12, 1976 decision of the Atlanta Field Office, FEAA. As corrective action, we recommend that appellant's change to lower grade be cancelled

and that he be restored to his former position, grade, and pay, restoactively to November 30, 1975. Documentation of compliance with this decision should be submitted to the Board, Attn: Compliance Desk, within 30 days of receipt of the decision.

There is no right of administrative appeal from a Board decision on a request for reopening. Administrative remedies are technically exhausted upon the issuance of a decision by the FEAA Appeals Officer. However, section 772.312 of the Civil Service regulations provides that the Commissioners, in their discretion, and notwithstanding the exhaustion of the right of appeal or the pendency of suit, may reopen and reconsider any previous decision on their own motion or when the party requesting reopening submits written argument or evidence which tends to establish that:

> the previous decision of the Board on a request to reopen and reconsider involves policy implicatio.. extending beyond the case at hand of such significance as to

merit the personal attention of the Commissioners.

If the agency has evidence or argument which is believed to meet this criterion, it must submit its request for reopening not later than 30 days from the date of this decision.

If the appellant has evidence or argument which is believed to meet this criterion, a request for reopening must be submitted within a reasonable time after receipt of this decision.

Such request should be sent to:

Assistant to the Commissioners (Appeals)
U.S. Civil Service Commission
Washington, D. C. 20415

For the Board:

Sincerely yours,

S/ Peggy S. Griffiths
Peggy S. Griffiths
Chairman

APPENDIX G

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

October 10, 1978

Mr. S. Neil Hosenball
General Counsel
National Aeronautics and
Space Administration
Washington, D. C. 20546

Dear Mr. Hosenball:

This is in further response to your petition dated August 21, 1978 on behalf of the National Aeronautics and Space Administration requesting the Commissioners of the Civil Service Commission to reopen and reconsider the appeal case of Mr. William C. Bush which was decided by the Commission's Appeals Review Board on July 14, 1978.

Section 772.312 of the Civil Service regulations provides in pertinent part that the Commissioners may, in their discretion, reopen and reconsider a previous decision of the Appeals Review Board when

the party requesting reopening submits written argument or evidence which tends to establish that the previous decision of the Board on a request to reopen and reconsider involves policy considerations extending beyond the case at hand of such significance as to merit the personal attention of the Commissioners.

We have carefully considered the written argument submitted in support of the request to have this case reopened. We find that it is not sufficient to meet the above criteria for reopening a previous decision of the Appeals Review Board. The file reflects that the issues pertinent to the adjudication of this appeal were fully considered by the Board in reaching its decision. We concur in the decision of the Board. The request to reopen this case must, therefore, be denied.

In view of the above the decision of the Board remains the final decision of the Civil Service Commission on this appeal and must be complied with by the agency. Evidence of compliance with

the Board's decision must, therefore, be forwarded to the Board without further delay.

For the Commissioners:

Sincerely,

S/ Robert B. Bates

Robert B. Bates
Assistant to the
Commissioners (Appeals)

APPENDIX H

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article 3, § 2, Cl. 1 of the United States Constitution, provides in pertinent part, that

> The judicial Power [of the United States] shall extend to all Cases. . .arising under this Constitution . . .[and] the Laws of the United States. . . .

The First Amendment to the Constitution of the United States provides, in pertinent part, that:

> Congress shall make no law . . .abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that

> No person shall ... be deprived of life, liberty or property ... without due process of law.....

Prior to 11 January 1979, Section 1301 of Title 5 of the United States Code provided that:

> The Civil Service Commission shall aid the President, as he may request, in preparing the rules he prescribes under this title for the administration of the competitive service.

At all material times, 5 U.S.C. § 3302 has provided in pertinent part, that:

> The President may prescribe rules governing the competitive service. . . .

As of 14 July 1976, the date of the C.S.C. Appeals Review Board's decision alluded to in the penultiate paragraph of the Fifth Circuit's opinion in this case (598 F. 2d 958 at 961), Section 5596 of Title 5 of the United States Code provided, in pertinent part, that:

> (a) For the purpose of this section, "agency" means--(1) An Executive agency....
>
> *** *** ***
>
> (b) An employee of an agency who, on the basis of an administrative determination or timely appeal, is found by appropriate

authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the. . . reduction of. . .a part of the pay allowances, or differentials of the employee -

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during the period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period. . . .

(c) The Civil Service Commission shall prescribe regulations to carry out this

section. . . .

Prior to a day in January 1979, Section 7511 of Title 5 of the United States Code provided, in pertinent part, that:

> (1) "preference eligible employee" means a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency. . . .
>
> *** *** ***
>
> (2) "adverse action" means a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay.

Prior to the same date, 5 U.S.C. § 7512 provided, in pertinent part, that:

> (a) An agency may take adverse action against a preference eligible employee. . . only for such cause as will promote the efficiency of the service. . . .

Prior to the same date, 5 U.S.C. § 7701 provided that:

A preference eligible employee as defined by section 7511 of this title is entitled to appeal to the Civil Service Commission from an adverse decision under section 7512 of this title of an administrative authority so acting. The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision, and is entitled to appear personally or through a representative under regulations described by the Commission. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends.

Section 1331 of Title 28 of the United States Code provides, in part, that:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arising under the Constitution, laws, or treaties of the United States. . . .

Section 1442 or Title 28 of the United States Code provides, in pertinent part, that:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place therein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office. . . .

As of the time that Lucas removed the action against him from state to federal court, Section 1446 of Title 28 of the United States Code provided, in pertinent part, that:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.
>
> (b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such

action or proceeding is based. . . .

*** *** ***

(d) Each petition for removal of a civil action or proceedings. . . .shall be accompanied by bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

*** *** ***

Prior to 1 January 1979, Civil Service Rule 5.1 read, in pertinent part, as follows:

(a) The [Civil Service] Commission is authorized and directed to promulgate and enforce such regulations as may be necessary to carry out the provisions of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes or executive orders imposing responsibilities on the Commission.

*** *** ***

(Exec. Order No. 10577, as amended; 19 Fed. Ref. 7521 [1956].)

The pertinent portions of the Civil Service Regulations in force at the time of the administrative review referred to in the opinions below read as follows: [5 CFR, Ch. 1,] PART 752 - ADVERSE ACTIONS BY AGENCIES

*** *** ***

Subpart A - General Provisions

[5 CFR] § 752.101 Applicability

This part applies to removals, suspensions, furloughs without pay, and reduction in rank or pay of employees of the Government of

the United States . . .

*** *** ***

[5 CFR] § 752.104 General standards.

(a) An agency may not take adverse action against an employee covered by this part except for such cause as will promote the efficiency of the service. . . .

*** *** ***

[5 CFR] § 752.202 Procedures.

(a) Notice of proposed adverse action.

(1)***

[A]n employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.

(2) *** [T]he material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may

review the material.

*** *** ***

(b) Employee's Answer.

*** [A]n employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answers.

*** If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing.

*** When the employee requests an opportunity to answer personally, the agency shall make a representative available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.

*** *** ***

(f) Notice of Adverse Decision.

The employee is entitled to notice of the agency's decision at the earliest practicable date. The decision shall be made by a higher level official of the agency, when that exists, than the office that proposed the adverse action. The agency shall deliver the notice of decision to employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee:

(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained;

(2) Of his right of appeal to the appropriate office of the [Civil Service] Commission;

(3) Of the time limit for appealing as provided in Section 752.204; and,

(4) Where he may obtain information on how to pursue an appeal.

[5 CFR] § 752.203 Right of appeal to the Commission.

An employee is entitled to appeal to the Commission from an adverse action covered by this subpart. The appeal shall be in writing and shall set forth the employee's reasons for contesting the adverse action, with such offer of proof and pertinent documents as he is able to submit.

(b) Finality of the decision.

The decision of the office of [Civil Service] Commission having appellate jurisdiction is final. However, either party to the appeal may petition the Appeals Review Board to reopen and reconsider the decision under § 772.310 of this chapter.

*** *** ***

[5 CFR, ch.1, Part 752]

Subpart D - Reversals of Adverse Actions

[5 CRF] § 752.401 Agency action when Commission recommends restoration or other corrective action.

It is mandatory that the agency take all corrective action recommended in the decision of the

[Civil Service] Commission office having appellate jurisdiction unless the agency petitions the Appeals Review Board to reopen and reconsider the decision under § 772.310 of this chapter.

*** *** ***

[5 CFR Ch. 1] PART 772 - APPEALS TO THE COMMISSION

*** *** ***

Subpart A - Office of the Commission Authorized to Decide Appeal

§ 772.101 The Federal Employee Appeals Authority.

The Federal Employee Appeals Authority reports directly to the [Civil Service] Commission and has authority to make final decisions on appeals to the Commission except as otherwise provided.

§ 772.102 The Appeals Review Board.

The Appeals Review Board reports directly to Commission. The board has authority to reopen and reconsider any decision of the Federal Employee Appeals Authority as provided in

§ 772.310. . . .

*** *** ***

Subpart C - Commission's Appellate Review of Actions Against Employees.

[5 CFR] § 772.301 Coverage.

(a) Agency-Initiated Actions.

Except as otherwise provided, this subpart applies to appeals to the Federal Employee Appeals Authority (hereinafter referred to as the Appeals Authority) under . . . Subparts B and C of Part 752 of this chapter.

*** *** ***

§ 772.305 Evidence.

(a) Affidavits. Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse decision. It is the responsibility of both parties to the appeal to submit all evidence to the appropriate office of the Appeals Authority. . . .

(b) Availability of evidence and representations.

A representative of the Appeals Authority shall discuss all relevant representations and evidence with both parties and make the presentations and evidence available to them for review. . . .

*** *** ***

[5 CFR] § 772.307 Hearings.

(a) Coverage. This section applies. . . to appeals under Subpart B of Part 752 of this chapter. . . .

(b) Right to a Hearing. An appellant is entitled to a hearing before the office of Appeals Authority having jurisdiction of the appeal. That office shall inform the appellant of his right to a hearing. If the appellant does not desire a hearing, he shall so advise that office in writing.

(c) Hearing procedures.

(1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative. The agency

is also entitled to participate in the hearing. Both parties are entitled to produce witnesses. The Appeals Authority is not authorized to subpoena witnesses.

(2) Any agency that has employees entitled to appeal to the Appeals Authority under this part shall make its employees available as witnesses at the hearing when (i) requested by the Appeals Authority after consideration of a request by the appellant or the agency and (ii) it is administratively practicable to comply with the request of the Appeals Authority. If the agency determines that it is not administratively practicable to comply with the request of the Appeals Authority, it shall submit to the Appeals Authority its written reason for the declination. If the reason for the declination is adequate, the Appeals Officer shall insert the explanation in the record, notify the appellant that his request for the witness(es) has been denied and provide the appellant with the reason for the denial. Employees of the agency shall be in a duty status

during the time they are made available as witnesses. Employees of the agency shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

(3) An appeals officer of the Appeals Authority shall conduct the hearing and shall afford the parties opportunity to introduce evidence (including testimony and statements by the appellant, his representative, representatives of the agency, and witnesses), and to cross-examine witnesses. Testimony is under oath or affirmation. Rules of evidence are not applied strictly, but the appeals officer shall exclude irrelevant or unduly repetitious testimony. The appeals officer may exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(4) Except as provided in subparagraph (5) of this paragraph, attendance at the hearing will be limited to persons determined by the appeals officer to have a direct connection with the appeal.

(5) When requested by the appellant and the agency does not object, the appeals officer shall hold a public hearing. When the agency objects, the appeals officer may deny the appellant's request only when he determines this action to be in the best public interest. The appeals officer[s], in his discretion, may close one or more sessions of a public hearing, when he determines that this action is in the best interest of the appellant, a witness, or the Government. The reasons for the appeals officer's decision to deny a request for a public hearing or to close one or more sessions of a public hearing shall be made a part of the record.

(6) The hearing is reported verbatim. The transcript is part of the record of the proceedings and a copy of the transcript shall be furnished to each party.

[5 CFR] § 772.308 Closing the record

(a) The Appeals Authority shall close the record in any case after the parties to the appeal have had a full opportunity to present any and all

relevant and material evidence. When there is a hearing, the record shall be closed at the conclusion of the hearing except that the appeals officer has discretion to permit the parties to submit written argument or briefs after the record is closed.

(b) When the record is closed there is no right to submit additional evidence into the record.

[5 CFR] § 772.309 Decision on Appeal

(a) The office of the Appeals Authority having initial jurisdiction of the appeal shall issue a written decision and send copies thereof to the appellant, his representative, and the agency. The decision on each appeal covered by this part shall contain an analysis of the evidence, findings, a statement of the reasons for the conclusions reached, and recommendation for any corrective action required. The agency shall report, within 30 calendar days after the receipt of the decision, that it has carried the decision into effect or that it is petitioning

the Appeals Review Board to reopen and reconsider the decision under section 772.310 of this chapter.

(b) The decision of appeal officer is final and there is no further right of appeal.

[5 CFR] § 772.310 Reopening and Reconsideration by the Appeals Review Board.

(a) Requests for a reopening and reconsideration. Either party may request the Appeals Review Board (hereinafter referred to as "Board") to reopen and reconsider any previous decision of an appeals officer. The Board may reopen and reconsider the decision when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the appeals officer was issued:

(2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or

(3) The decision of the appeals officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand.

*** *** ***

(c) Where to file. Requests to reopen and reconsider a decision of an appeals officer shall be filed with the Appeals Review Board, U. S. Civil Service Commission, Washington, D.C. 20415.

(d) How to file. A request to reopen and reconsider a decision of an appeals officer shall be in writing and set forth in detail the reasons for the request.

(e) Impact of a request to reopen upon the previous decision.

*** *** ***

(2) An agency request for reopening under paragraph (a) of this section shall stay the corrective action recommended by the appeals officer. . . .

*** *** ***

(f) Board procedures. The Board shall review any request to reopen to determine whether a basis for reopening under § 772.310 (a) has been established. When the Board determines that the request does not establish a basis for reopening the Board shall notify the requesting party in writing of its decision to deny the request. When the Board reopens a previous decision, the Board will determine and conduct whatever further investigation is necessary. There is no right to a hearing before the Board. The Board may, in its discretion, afford the parties an opportunity to appear personally and present oral argument and representations.

(g) Reconsideration Decision of the Board. When the Appeals Review Board has reopened an appeals officer's decision for reconsideration, it shall review the record of the proceedings and all written representations. The Board shall issue a written decision and shall send copies thereof to the parties and to the employee's representative. The decision of the Board is final. When corrective action is recommended, the agency shall report

promptly to the Board that the corrective action has been taken.

*** *** ***

[5 CFR] § 772.312 Review by the Commission.

(a) The [Civil Service] Commissioners may, in their discretion, reopen and reconsider any previous decision on their own motion or when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) The previous decision of the Board on a request to reopen and reconsider involves policy implications extending beyond the case at hand of such significance as to merit the personal attention of the Commissioners. . . .

*** *** ***

(b)*** When a request to reopen is denied, the agency shall effect the corrective action recommended by the Board, and there is no further right by the agency to request reopening. . . .

The text of Rule 56(f) of the Federal Rules of Civil Procedure reads as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

APPENDIX I

SM 13-8106 June 1981

Federal Civilian Work Force Statistics

Monthly Release

Employment Trends as of April 1971

by United States Office of Personnel Management

* * * * * * * * *

(at page 6)

Total [Federal] Civilian Employment[A/], April 1981

2,899,002

* * * * * * * * *

A/ Excludes Central Intelligence Agency and National Security Agency ------

* * * * * * * * *

APPENDIX J

REPORT NO.51A DATE PREPARED 7/22/81

U.S. DEPARTMENT OF JUSTICE

FEDERAL PRISON SYSTEM

FEDERAL PRISONERS CONFINED ON 7/20/81

PREPARED BY INFORMATION SUPPORT SYSTEMS

INSTITUTIONS	TOTAL INCLUDING FURLOUGHS
TOTAL ALL INSTITUTIONS	25,871

* * * * * * * * *

Office - Supreme Court, U.S.
FILED
NOV 12 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-469

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. BUSH, PETITIONER

v.

WILLIAM R. LUCAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
WILLIAM KANTER
WENDY M. KEATS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a federal employee who contends that he was demoted in retaliation for the exercise of his First Amendment right of free speech, and who was subsequently reinstated with full back pay after administrative proceedings, may maintain a *Bivens*-type constitutional tort action for damages against his superior.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Arnett v. *Kennedy*, 416 U.S. 134 ..... 5, 7
Barr v. *Matteo*, 360 U.S. 564 3
Bishop v. *Tice*, 622 F.2d 349 ..... 9, 10, 11, 12
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 ..... *passim*
Brown v. *GSA*, 425 U.S. 820 ..... 9, 10
Bush v. *Lucas*, 446 U.S. 914 4
Butz v. *Economou*, 438 U.S. 478 8
Carlson v. *Green*, 446 U.S. 14 ..... 4, 5, 6, 7, 9, 11, 12
Dabney v. *Freeman*, 358 F.2d 533 12
Davis v. *Passman*, 442 U.S. 228 ..... 4, 7
Givhan v. *Western Line Consolidated School District*, 439 U.S. 410 8
Gratehouse v. *United States*, 512 F.2d 1104 12
Mt. Healthy City Board of Education v. *Doyle*, 429 U.S. 274 8
Murray v. *Defense Mapping Agency*, Dkt. No. DA 075299007 (MSPB, Jan. 17, 1980) 12
Parratt v. *Taylor*, No. 79-1734 (May 18, 1981) 7
Pickering v. *Board of Education*, 391 U.S. 563 7
Purtill v. *Harris*, 658 F.2d 134 ..... 9, 11
Sampson v. *Murray*, 415 U.S. 61 ..... 5, 7
Shewmaker v. *Minchew*, No. 80-2370 (D.C. Cir. Oct. 14, 1981) 11
Sonntag v. *Dooley*, 650 F.2d 904 ..... 11, 12

Constitution, statutes, and regulations: Page

United States Constitution, First Amendment 3, 7, 8
Back Pay Act of 1948, ch. 447, 62 Stat. 354 8
Back Pay Act of 1966, 5 U.S.C. 5596 ..... 8, 10
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1135-1144, 5 U.S.C. (Supp. IV) 7511-7703 8
5 U.S.C. (Supp. IV) 7512(1) 12
5 U.S.C. (Supp. IV) 7513(d) 12
5 U.S.C. (Supp. IV) 7703 10
Lloyd-LaFollette Act of 1912, ch. 389, Section 6, 37 Stat. 555 8
Pendleton Act of 1883, ch. 27, 22 Stat. 403 8
5 U.S.C. 706 10
5 C.F.R. (1979):
Part 752, Subparts C and D 8
Part 754 8

Miscellaneous:

S. Rep. No. 1062, 89th Cong., 2d Sess. (1966) 10

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-469

WILLIAM C. BUSH, PETITIONER

v.

WILLIAM R. LUCAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. A) is reported at 647 F.2d 573. The order of this Court vacating the initial judgment of the court of appeals and remanding the case for further consideration in light of *Carlson* v. *Green*, 446 U.S. 14 (1980) (Pet. App. B), is reported at 446 U.S. 914. The initial opinion of the court of appeals (Pet. App. C) is reported at 598 F.2d 958. The opinions of the district court (Pet. App. D), and the Civil Service Commission (Pet. Apps. E, F, and G) are not reported.

JURISDICTION

The judgment of the court of appeals after remand was entered on June 12, 1981. The petition for a writ of certiorari was filed on September 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an aerospace engineer who has been employed for more than six years by the National Aeronautics and Space Administration (NASA) at the Marshall Space Flight Center in Alabama. Respondent is the Director of the Center. In the spring of 1975, following a reorganization of the civil service employees at the Center, petitioner made a number of well-publicized statements concerning his lack of meaningful work. Subsequently, in June 1975, respondent, in his capacity as Director, presided over a press conference commemorating the 15th anniversary of the Center. At the conclusion of the press conference, respondent was questioned about petitioner's allegations. He replied that he had had petitioner's statements investigated and that they had no basis in fact (Pet. Apps. cl-4 to cl-5; d-2 to d-3; e-2 to e-3).

In August 1975, a personnel action was initiated against petitioner to remove him from his position, and the matter was ultimately appealed to the respondent. Following a hearing, respondent notified petitioner that he would not be removed but that he was being reduced in grade from a GS-14 to a GS-12 position. Petitioner appealed this adverse action to the Civil Service Commission (Pet. Apps. cl-5 to cl-6; d-3 to d-4). In August 1976, the Commission's Regional Field Office rejected petitioner's claims (*id.* at e-1 to e-42), concluding that petitioner's public

"statements were misleading; that they generated an environment of sensationalism demeaning to the government, the agency, and its personnel at [the Center,] and that they impeded government efficiency and economy and adversely affected public confidence in the government service" (*id.* at e-31). In July 1978, the Commission's Appeals Review Board reopened, reconsidered, and reversed the adverse personnel determination (*id.* at f-1 to f-27). The Board found that although petitioner's comments were exaggerated, they were not motivated by malice and "were not wholly without truth" (*id.* at f-17 to f-18, f-25). The Board further determined that petitioner's First Amendment interests outweighed the proven disruption to the agency's operation in this case (*id.* at f-25). Accordingly, the Board recommended that petitioner be reinstated to his former grade and position and be awarded $30,724.40 in back pay (*id.* at f-26).[1]

2. Prior to the Board's decision, petitioner filed this suit in state court, claiming, *inter alia*, that respondent had conspired with others to demote petitioner in violation of his First Amendment rights.[2] Respondent removed the case to the United States District Court for the Northern District of Alabama, and moved for summary judgment. In February 1977, the district court granted respondent's motion

---

[1] NASA fully accepted and effected this recommendation.

[2] Petitioner also contended that respondent's answer at the June 1975 press conference was defamatory. The court of appeals, however, has twice upheld the district court's ruling that respondent is entitled to absolute immunity from the defamation claim (Pet. Apps. a-3; cl-6 to cl-10), and petitioner does not seek further review by this Court of the dismissal of that claim. See *Barr* v. *Matteo*, 360 U.S. 564 (1959).

(Pet. Apps. cl-6; d-1 to d-17). The district court held that petitioner could not maintain a cause of action for damages because of the availability of administrative review of the adverse personnel action and because of the "importance of the government's interests in promoting the efficiency and integrity of its public services through its employees" (*id.* at d-14 to d-16).

3. The court of appeals affirmed (Pet. App. cl-1 to cl-14). Noting that this Court in *Davis* v. *Passman*, 442 U.S. 228 (1979), had found an implied constitutional tort remedy in large part because of the absence of any effective alternative remedy for the employee claimant there, the court of appeals concluded that an implied constitutional remedy is unnecessary for petitioner because the civil service statutes and regulations have provided him with an adequate remedy for his demotion (Pet. App. cl-11 to cl-14). Accordingly, the court of appeals held that petitioner was not entitled to seek a constitutional remedy in addition to the administrative remedy he had already successfully pursued (*id.* at cl-12 to cl-14).

4. Petitioner then filed a petition for a writ of certiorari in this Court. *Bush* v. *Lucas*, No. 79-1044. On April 28, 1980, the Court summarily granted the petition, vacated the judgment below, and remanded the case for further consideration in light of the intervening decision in *Carlson* v. *Green*, 446 U.S. 14 (1980) (Pet. App. B; 446 U.S. 914 (1980)).

5. On remand, the court of appeals reaffirmed the entry of summary judgment for the respondent (Pet. App. a-1 to a-12). The court of appeals noted that, under this Court's decision in *Carlson*, petitioner would be entitled to seek a constitutional damage remedy for retaliatory demotion unless either (1) "special factors are present which counsel hesitation

in the absence of affirmative action by Congress," or (2) Congress has "provided an alternative remedy" which it intended as an equally effective substitute for a *Bivens* remedy (Pet. App. a-5 to a-6). The court of appeals concluded that "the unique relationship between the Federal Government and its civil service employees" is a special factor "which counsels hesitation in inferring a *Bivens* remedy" in this context, and therefore found it unnecessary to consider the alternative remedy question (*id.* at a-6).

Citing *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974), and *Arnett* v. *Kennedy*, 416 U.S. 134, 155 (1974) (opinion of Rehnquist, J.), the court of appeals noted that this Court has recognized that the federal government's relationship as an employer with its employees is fundamentally different from the government's role as sovereign over private citizens generally (Pet. App. a-6 to a-7). The court of appeals also observed that Congress has demonstrated its awareness of this special relationship by developing and continuing to improve a system of comprehensive statutory and administrative remedies for aggrieved civil servants (*id.* at a-8 to a-10). These considerations, the court held, serve to distinguish suits by federal civil service employees against their superiors from suits such as *Bivens* and *Carlson*, in which private citizens sought damages against agents of the government acting in its sovereign capacity (*id.* at a-10). Allowing a *Bivens* remedy in the governmental employment context, in the court of appeals' view, not only would undercut and interfere with Congress's painstaking efforts in this area of traditional governmental control and concern, but also would encourage aggrieved employees to bypass the statutory and administrative

remedies and would ultimately discourage Congress from continuing to improve federal employee grievance mechanisms (*id.* at a-10 to a-11). Therefore, the court held, in the absence of more explicit direction from Congress, a *Bivens* remedy should not be implied (*id.* at a-12).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Accordingly, further review by this Court is unwarranted.

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court held that, at least in some circumstances, a person aggrieved by unconstitutional federal action may bring a suit based directly on the Constitution to recover damages for the injuries suffered. In *Carlson* v. *Green*, 446 U.S. 14 (1980), however, the Court declared that a *Bivens* remedy will not be available in either one of two situations: (1) where there are "special factors counselling hesitation" in implying a constitutional remedy in the absence of affirmative action by Congress, or (2) where Congress has provided an equally effective alternative remedy under circumstances suggesting that it is meant as a substitute for a constitutional remedy. 446 U.S. at 18-19. Under either of these criteria, a *Bivens* remedy for petitioner is not appropriate and his suit was correctly dismissed.

1. The court of appeals correctly held that special factors present in this case preclude the availability of a *Bivens* remedy. Although this Court has not yet had occasion affirmatively to define "special

factors,"[3] it has often recognized the special nature of the federal government's relationship with its own civil service employees. See, *e.g.*, *Sampson* v. *Murray*, *supra*, 415 U.S. at 83 (citation omitted) (noting the "well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs' "); *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 168 ("the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs" (opinion of Powell, J.)). Indeed, as the court of appeals noted, this Court has specifically held that the special considerations inherent in the public employment relationship serve to limit the exercise of the First Amendment right of free speech by public employees when the exercise of that right interferes with the efficiency and integrity of the government's functioning. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).[4]

---

[3] The Court found no special factors present in either *Bivens* (403 U.S. at 396-397) or *Carlson* (446 U.S. at 19), and the concerns raised by the claim in *Davis* v. *Passman*, *supra*, were held to be "coextensive with the protections afforded [the defendant congressman] by the Speech or Debate Clause." 442 U.S. at 246.

[4] That limitation is especially significant here, in view of petitioner's contention that the improper personnel action was a retaliation for his exercise of First Amendment free speech rights. When the district court applied the *Pickering* analysis (balancing the employee's right to free speech against the public interest in the employer's efficient conduct of public business), it concluded that petitioner had not shown a constitutional deprivation (Pet. App. d-16). If this Court agrees with that conclusion, there is no need to decide whether a *Bivens* remedy would be available here. See *Parratt* v. *Taylor*, No. 79-1734 (May 18, 1981).

Moreover, Congress has long been active in this area. Consistent with its responsibility to provide for effective and efficient federal management, Congress has diligently attempted to create extensive substantive and procedural safeguards for federal employee rights, as well as comprehensive mechanisms for the resolution of employee grievances.[5] Petitioner has had the full advantage of those remedies: the adverse action was rescinded and he was reinstated to his former position with full back pay.[6] The court of appeals quite properly concluded that the availability of an additional remedy, based upon

---

[5] Congressional efforts began with the Pendleton Act of 1883 ch. 27, 22 Stat. 403, and continued through the Lloyd-LaFollette Act of 1912, ch. 389, Section 6, 37 Stat. 555; the Back Pay Act of 1948, ch. 447, 62 Stat. 354; and the Back Pay Act of 1966, 5 U.S.C. 5596 (under which petitioner ultimately obtained his administrative relief in this case). See also 5 C.F.R. Part 752, Subparts C and D, and Parts 754 and 772 (1979). Most recently, Congress's efforts in this area have culminated in the enactment of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1135-1144, 5 U.S.C. (Supp. IV) 7511-7703). (That statute was enacted after petitioner filed this suit.)

[6] In view of that monetary and equitable relief, together with the Civil Service Commission's acknowledgement that petitioner's free expression rights under the First Amendment outweighed any disruption to the agency's work caused by his comments, it is not apparent what further relief petitioner could obtain, even if he were permitted to pursue his constitutional cause of action. Cf. *Bivens* v. *Six Unknown Named Agents*, *supra*, 403 U.S. at 406-409 (Harlan, J., concurring); *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 413 (1979); *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 277 (1977). We further note that respondent is in any event entitled to assert at least a qualified immunity as a defense to petitioner's claim for damages. See *Butz* v. *Economou*, 438 U.S. 478, 507-508 & n.35 (1978).

the Constitution, for alleged improper federal personnel actions would constitute an unwarranted interference with the government's ability to solve its internal personnel problems within the comprehensive statutory framework. The unique considerations present in the federal employment context therefore constitute "special factors" that counsel against implying a constitutional remedy for federal employee grievances, and mandate the dismissal in this case. Accord, *Bishop* v. *Tice*, 622 F.2d 349, 357 (8th Cir. 1980); *Purtill* v. *Harris*, 658 F.2d 134, 137-138 (3d Cir. 1981).

2. Although the court of appeals found it unnecessary to address the "alternative remedy," or preemption, prong of the *Carlson* doctrine, it is clear that the decision below could be upheld on that basis as well.

A defendant need not show that Congress recited any "magic words" to demonstrate that Congress meant to preempt a *Bivens* remedy or to provide an equally effective substitute remedy; rather, the inquiry is limited to a determination of congressional intent. *Carlson* v. *Green*, *supra*, 446 U.S. at 19 n.5; *Purtill* v. *Harris*, *supra*, 658 F.2d at 137-138 (holding that in Section 15 of the Age Discrimination in Employment Act, 29 U.S.C. 633a, Congress intended to preempt a *Bivens* remedy for claims of age discrimination in federal employment). In making this determination in other contexts, the Court has looked both to the legislative history and to the structure of the overall statutory scheme. *Carlson* v. *Green*, *supra*; *Brown* v. *GSA*, 425 U.S. 820 (1976). Thus in *Carlson*, the Court was persuaded by explicit language in the legislative history that the Tort Claims Act Amendments at issue were not intended to sup-

plant *Bivens* relief. In *Brown*, both the legislative history and the "balance, completeness and structural integrity" of the legislative remedy persuaded the Court that Title VII of the Civil Rights Act of 1964 was intended to be the exclusive remedy for federal employees asserting claims of race discrimination in federal employment. 425 U.S. at 828, 832.

No language in the civil service statutes or regulations or in their legislative history expressly preserves a *Bivens* remedy for the redress of improper personnel actions. On the contrary, the legislative history of the Back Pay Act of 1966, 5 U.S.C. 5596 (applicable at the time petitioner successfully pursued his administrative remedy), shows that Congress believed that it was providing a complete remedy in the form of extensive procedural protections, reinstatement, and back pay for employees subjected to unjustified adverse personnel actions.[7] Moreover, the very detail and comprehensiveness of Congress's continuous efforts to provide civil service protections and remedies, together with the provisions for limited judicial review,[8] manifest Congress's continuing expectation that the administrative process is to provide complete relief and is not to be bypassed or undermined by employees' suits brought against their superiors directly under the Constitution. *Bishop* v. *Tice, supra.*

---

[7] See S. Rep. No. 1062, 89th Cong., 2d Sess. 1 (1966), which states that the Back Pay Act of 1966 was intended to be "perfecting legislation" to round out and fill in the gaps in previous legislative efforts, and to "put[] the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place."

[8] See, *e.g.*, 5 U.S.C. 706; 5 U.S.C. (Supp. IV) 7703.

3. The decisions of other courts of appeals in *Bivens* suits arising from federal employee adverse actions are in accord with this decision, on the basis of one or both of the *Carlson* exceptions. *Purtill* v. *Harris*, *supra* (special factors and alternative remedy); *Bishop* v. *Tice*, *supra* (special factors). Only one court of appeals has allowed a federal employee to pursue a *Bivens* remedy for an alleged wrongful personnel action. *Sonntag* v. *Dooley*, 650 F.2d 904 (7th Cir. 1981).[9] Petitioner contends that in view of the different result in *Sonntag*, there is a conflict among the circuits that this Court must resolve (Pet. 31-35). The suggested conflict is more apparent than real, however, and does not warrant certiorari.

The plaintiff in *Sonntag* contended that her superiors and fellow employees had harassed her to the point that her health had deteriorated and she was forced to retire. In concluding that she was entitled to pursue a *Bivens* remedy, the Seventh Circuit touched on the "special factors" question only in passing, and failed to consider whether the federal employment relationship and legislative remedies could be considered special factors counselling

---

[9] In *Shewmaker* v. *Minchew*, No. 80-2370 (D.C. Cir. Oct. 14, 1981), the panel stated in dictum that it declined to adopt the view of the district court that the appellant, a discharged federal employee, had "no private right of action under the Fifth Amendment because an alternative remedy is available through administrative procedures" (slip op. 3). Because the panel agreed that the appellant had failed adequately to allege any "liberty" or "property" interest, however, it did not "apply the *Carlson* v. *Green* standards to the remedies available to appellant" to determine if a *Bivens* remedy should be made available (*ibid.*). The decision thus creates no conflict on the issue presented in this case.

against implying a *Bivens* remedy. 650 F.2d at 907.[10] The *Sonntag* decision was, instead, principally influenced by the Seventh Circuit's belief that the plaintiff's "coerced retirement" claim was irremediable under the civil service laws and that therefore she had no alternative remedy available. *Ibid.* In fact, the *Sonntag* court's premise was flatly wrong;[11] but what is more significant for present purposes, its conclusion that a *Bivens* remedy must be implied in the circumstances as the court understood them to be in that case would have no application in a case such as this, where administrative redress is not only fully available to the employee, but has been successfully pursued. Thus, *Sonntag* does not present a conflict requiring this Court's resolution.

---

[10] The court merely observed that the defendants there did not have " 'such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate,' " and that the qualified immunity available in a *Bivens* suit would adequately protect them from being inhibited in the performance of their official duties by having to defend the suit. *Ibid.*, *quoting Carlson* v. *Green*, *supra*, 446 U.S. at 19.

[11] Ample judicial authority, administrative practice, and unequivocal opinions of the Merit Systems Protection Board make plain the unquestioned authority of the MSPB (and before that, the Civil Service Commission) to consider "coerced retirement" claims like Sonntag's. See, *e.g.*, *Gratehouse* v. *United States*, 512 F.2d 1104, 1108, 1111-1112 (Ct. Cl. 1975); *Dabney* v. *Freeman*, 358 F.2d 533, 535 (D.C. Cir. 1965); *Bishop* v. *Tice*, *supra*; *Murray* v. *Defense Mapping Agency*, Dkt. No. DA 075299007 (MSPB Jan. 17, 1980). See 5 U.S.C. (Supp. IV) 7512(1) and 7513(d).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
WILLIAM KANTER
WENDY M. KEATS
Attorneys

NOVEMBER 1981

★ U. S. GOVERNMENT PRINTING OFFICE: 1981 927708 977

Office - Supreme Court, U.S.
FILED
NOV 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. BUSH,
Petitioner

v.

WILLIAM R. LUCAS,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMICI CURIAE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AND NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION

ELMER G. NEUMANN,
Counsel of Record

RICHARD J. HIRN,
General Counsel, National Weather Service Employees Organization,
Attorney for the Public Employee Department, AFL-CIO
400 North Capitol Street, Suite 326
Washington, D.C. 20001
Telephone: (202) 783-3131

EDWARD J. HICKEY, JR.
General Counsel, Public Employee Department, AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. A *Bivens* Remedy Is The Rule, Not The Exception	4
B. There Are No "Special Factors Counselling Hesitation" In The Instant Case	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) ..... *passim*
Bush v. Lucas, 446 U.S. 14 (1980), *remanded*, 647 F.2d 573 (5th Cir. 1981) ..... *passim*
Butz v. Economou, 438 U.S. 478 (1978) 8
Carlson v. Green, 446 U.S. 14 (1980) ..... *passim*
Davis v. Passman, 442 U.S. 228 (1979) 6
Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979) 4
Marbury v. Madison, 1 CRANCH 137 (1803) 9
Pickering v. Board of Education, 391 U.S. 563 (1968) 5, 6, 9

Statutes:

5 U.S.C. § 7111 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-469

WILLIAM C. BUSH,

Petitioner

v.

WILLIAM R. LUCAS,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMICI CURIAE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AND NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION

INTEREST OF THE AMICI

The Public Employee Department of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and the National Weather Service Employees Organization (affiliated with the Marine Engineers' Beneficial Association, AFL-CIO) file this brief, *amici curiae*, in support of the Petition for Certiorari of William Bush, pursuant to Rule 36 of the Rules of the Supreme Court.[1] The Public Employee Department

[1] All parties consented to the filing of this *amici curiae* brief.

is an association of national and international labor unions which are affiliated with the AFL-CIO and have members employed in the public sector. The National Weather Service Employees Organization is the exclusive bargaining representative for approximately four thousand employees of the National Weather Service in the National Oceanic and Atmospheric Administration of the Department of Commerce, pursuant to the Civil Service Reform Act of 1978, 5 U.S.C. § 7111. The objectives of the *amici* include promoting and securing improved wages, hours and working conditions through collective bargaining, legislation and other appropriate means.

The Public Employee Department and the National Weather Service Employees Organization offer their *amici curiae* brief in this case on behalf of the interests of the federal employees who may be affected by the decision of this Court.

SUMMARY OF ARGUMENT

This case presents the question of whether a civilian employee of the United States government has a cause of action against his supervisor or superior *as an individual* for constitutional violations occurring in an employment context. The Petitioner is a career civilian employee of the National Aeronautics and Space Administration who brought an action against his superior, the Respondent herein. Petitioner alleged that he was improperly demoted by the Respondent in violation of his First Amendment protections in retaliation for publicly criticizing the management of the agency concerning waste. In the Court of Appeals the Petitioner contended that his status as a federal employee does not deprive him of a cause of action against a federal agent for constitutional violations when such a cause of action exists for all other citizens pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The United States Court of Appeals for the Fifth Circuit held, however, that federal employees may not seek

damages from other individual federal employees or officials for constitutional violations. The Court of Appeals ruled that the existence of an available remedy under Civil Service Commission regulations to reinstate the Petitioner to his former position deprived him of a cause of action against his superior as an individual.

The Petition for Certiorari should be granted because the decision of the Court of Appeals conflicts with the decisions of this Court in *Bivens v. Six Unknown Fed. Narcotics Agents* and *Carlson v. Green*, 446 U.S. 14 (1980).[2] *Carlson v. Green* made it clear that a *Bivens* remedy for constitutional violations exists unless Congress has provided an alternative remedy which it explicitly declared to be a substitute for a *Bivens* remedy and which is equally effective, or unless there was some other special factor counselling hesitation. *Id.* at 18-19. The Court of Appeals used the existence of a partial remedy under civil service regulations as an excuse for defeating the Petitioner's cause of action by anointing it a "special factor counselling hesitation." It is clear from this Court's decision in *Carlson v. Green* that an alternative remedy is not a "special factor counselling hesitation" and should not defeat a *Bivens* remedy unless Congress explicitly provided that the alternate remedy is to be a substitute for a *Bivens* remedy and is equally effective. The Court of Appeals has treated this case as an action brought by an employee against his employer, the United States, to be reinstated to a position from which he was improperly removed. However, this case is solely an action for damages brought by one employee against another employee, *as an individual*, who allegedly misused his office to violate the Petitioner's constitutional rights.

---

[2] The instant case was previously before this Court which vacated an earlier judgment of the Court of Appeals and remanded it for further consideration in light of *Carlson v. Green*. *Bush v. Lucas*, 446 U.S. 914 (1980).

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND HAS DEPRIVED MILLIONS OF CITIZENS IN FEDERAL EMPLOY OF AN AVENUE FOR REDRESSING CONSTITUTIONAL VIOLATIONS.

A. A *Bivens* Remedy Is The Rule, Not The Exception.

Damage suits for vindication of individual rights date from the eighteenth century in England and have been widely recognized in our courts. *Halperin v. Kissinger*, 606 F.2d 1192, 1207 (D.C. Cir. 1979) (and cases cited therein at n.98). *Bivens v. Six Unknown Fed. Narcotics Agents* established that the victim of a constitutional violation by a federal official or agent has a right to recover damages from the official in federal court despite the absence of any statute conferring that right. This Court stated in *Bivens* that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395.

In *Carlson v. Green*, which held that a plaintiff could maintain an action for damages against federal prison officials for constitutional violations even though she could bring an action for damages under the Federal Tort Claims Act, this Court stated that a *Bivens* remedy can only be precluded in two situations:

> The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress". The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.

446 U.S. at 18-19. (citations omitted). This Court found that neither of these situations were present in *Carlson*, despite the existence of the second remedy for the plain-

tiff under the Federal Tort Claims Act. This alternate remedy was neither an explicit substitution nor a "special factor counselling hesitation." However, the Court of Appeals in the instant case has held that the alternative partial remedy afforded the Petitioner by civil service regulations is a "special factor counselling hesitation" and denied him a *Bivens* remedy.[3]

The Fifth Circuit has deprived the Petitioner of basic rights afforded other citizens merely because of his status as a federal employee, without any real countervailing government interest at stake which warrants such a limitation as is required by *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).[4] The unique decision of the Court of Appeals herein affords federal employees less constitutional protection than federal prisoners. *See, Carlson v. Green.*

B. There Are No "Special Factors Counselling Hesitation" In The Instant Case.

The "special factors counselling hesitation" which the Court of Appeals found in this case are spurious. In refusing to allow a *Bivens* remedy to aggrieved individuals who are federal employees, the Court of Appeals stated:

> The roll of the Government as an employer towards its employees is fundamentally different from its role as sovereign over private citizens generally . . . [it is a] "well established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.' "

---

[3] Petitioner was reinstated with back pay by the Civil Service Commission's Appeals Review Board almost three years after he appealed his demotion through administrative channels. Petition for Certiorari, No. 81-469, pp. 13, 17.

[4] In *Pickering v. Board of Education*, this Court held that a teacher's exercise of his right to speak on issues of public concern can not furnish the basis for dismissal from public employment unless the statements made are knowingly or recklessly false. 391 U.S. at 574.

647 F.2d at 576. However, the court below has misperceived the nature of this case. It is not a dispute to settle an internal government-employee relations problem. It is an action brought by one individual against another individual who has misused his public office.

There will be no government interest served by denying a *Bivens* remedy to the Petitioner. It will not encourage aggrieved federal employees "to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the government of the opportunity to work out its personnel problems within the framework" it established, as the Court of Appeals believes. 647 F.2d at 577. The Petitioner's suit against the Respondent could never have reinstated the Petitioner to his proper grade level in the government, because the United States is not a party to this action. The administrative remedy under the civil service regulations could never compensate the Petitioner for the punitive and other damages he seeks in this action for the violation of his constitutional rights. The fact that the Petitioner has pursued his administrative remedy to seek reinstatement in addition to bringing this action evinces that a *Bivens* remedy will not encourage federal employees to bypass statutory and administrative remedies as the court below fears.

A *Bivens* remedy in this case would promote, rather than hinder, the government's effective operation of its personnel programs and practices. It would deter other federal officials and agents from abusing the federal personnel system by engaging in unconstitutional acts such as race or gender discrimination, *see, Davis v. Passman*, 442 U.S. 229, 234-235 (1979), retaliation for criticism of government policies, *see, Pickering v. Board of Education*, 391 U.S. at 574, or retaliation for public exposure of government waste, as is alleged herein. This Court took note of the importance of deterring future constitutional violations in *Carlson v. Green* when it granted a cause of action in addition to the Federal Tort Claims Act remedy:

> . . . the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability * * *
>
> Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.

446 U.S. 21, 22 (citations and footnotes omitted). A *Bivens* remedy would also promote the effectiveness of the administrative remedy because its deterrent effect will reduce the number of cases under administrative review. In the Petitioner's case, almost three years elapsed between the date on which he invoked an administrative appeal of his grade reduction and the date on which he was reinstated to his proper position.

It is clear from this Court's decision in *Bivens* and in *Carlson v. Green* that the existence of another partial remedy for a constitutional violation is not what this Court meant by "a special factor counselling hesitation." This Court has clearly stated that only alternative remedies which Congress *explicitly* indicated to be a substitute for a *Bivens* remedy and which provide an equally effective remedy will preclude a *Bivens* action. In the instant case, the Court of Appeals has pointed to nothing in the legislative history of the civil service laws or the new Civil Service Reform Act of 1978 which indicates that an administrative remedy was intended to be exclusive. Punitive damages were not available to the Petitioner as relief in the administrative remedy and therefore the administrative remedy is "much less effective than a *Bivens* action as a deterrent to constitutional acts." *Carlson v. Green*, 446 U.S. at 22. The Court of Appeals has ignored the clear intent of this Court by designating the administrative remedy, which is neither an explicit substitute nor equally effective, as a "special factor counselling hesitation." In justifying

this result, the Court below said "the result in this case might be different if failure to recognize a *Bivens* remedy would leave Bush . . . without *any* remedy . . ." 647 F.2d at 577 (emphasis supplied). This Court has made it clear that only those remedies which are equally effective will preclude a *Bivens* cause of action:

> . . . the inquiry is whether Congress has created what it views as an equally effective remedial scheme. Otherwise the two can exist side by side.

Carlson v. Green, 446 U.S. at 22, n.10. The Court of Appeals' reasoning which accepts any remedy as a substitute for a *Bivens* remedy is clearly at odds with the law as pronounced by this Court.

The decision below is also incorrect when it states that "[t]here is little guidance in the Supreme Court Opinions as to what 'special factors' will justify withholding a *Bivens* remedy." 647 F.2d at 576. In *Bivens*, this Court analyzed several special factors which might preclude a cause of action, such as situations which raise "a question of 'federal fiscal policy'." 403 U.S. at 396. This case does not raise a question of federal fiscal policy at all because recovery is sought only from the Respondent, an individual, and not from the United States. This Court expanded on the meaning of "special factors counselling hesitation" in *Butz v. Economou* when it held that federal officials may not "willfully or knowingly violate constitutional rights without fear of liability." 438 U.S. 478, 495 (1978):

> In *Bivens*, the Court . . . looked for "special factors counselling hesitation." 403 U.S., at 396. Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages, *id.*, at 397, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim, see *id.*, at 409 (Harlan, J. concurring in judgment).

438 U.S. at 478. The Petitioner's claim herein is compensable in damages and the district court is qualified

to handle the type of questions raised by the Petitioner's claim. Therefore there are no special factors counselling hesitation against allowing him to litigate his claim in district court.

CONCLUSION

In *Pickering v. Board of Education*, the Court said that it was "essential" that public employees "be able to speak out . . . without fear of retaliatory dismissal." 391 U.S. at 572. The availability of an administrative remedy for the Petitioner clearly did not deter the Respondent from dismissing him in retaliation for publicly exposing government waste. Something more is obviously needed to protect the constitutional rights of public employees. Chief Justice Marshall wrote that "[t]he very essence of civil liberty certainly consists in the right of *every* individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 CRANCH 137,163 (1803) (emphasis supplied). There are no reasons why a *Bivens* remedy should be denied the Petitioner and other federal employees when it is accorded all others.

For these reasons, the *amici* respectfully submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ELMER G. NEUMANN,
Counsel of Record
RICHARD J. HIRN,
General Counsel, National Weather Service Employees Organization,
Attorney for the Public Employee Department, AFL-CIO
400 North Capitol Street, Suite 326
Washington, D.C. 20001
Telephone: (202) 783-3131
EDWARD J. HICKEY, JR.
General Counsel, Public Employee Department, AFL-CIO

Office - Supreme Court, U.S.
FILED
NOV 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-469

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

WILLIAM C. BUSH,
Petitioner,
v.
WILLIAM R. LUCAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MITCHELL JAY NOTIS
Staff Counsel
MARK D. ROTH
Assistant General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700
Attorneys for *Amicus Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a federal employee whose constitutional rights have been violated by a federal official can recover damages against the official in federal court.

TABLE OF CONTENTS

	Page
Question Presented	i
Preliminary Statement	1
Interest of the *Amicus Curiae*	2
Reasons for Granting the Writ	4
I. The Decision Below Raises Significant Questions Concerning the Right of Federal Employees Whose Constitutional Rights Have Been Violated by Federal Officials, to Recover Damages Against the Officials in Federal Court	4
II. The Decision Below Conflicts with the Decisions of Other Courts of Appeals Concerning the Right of Federal Employees Whose Constitutional Rights Have Been Violated by Federal Officials, to Recover Damages Against the Officials in Federal Court	9
Conclusion	12

TABLE OF AUTHORITIES

CASES:	Page
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)	*passim*
Bush v. Lucas, 647 F.2d 573 (5th Cir. 1981)	*passim*
Butz v. Economou, 483 U.S. 478 (1978)	6, 7
Carlson v. Green, 446 U.S. 14 (1980)	*passim*
Davis v. Passman, 442 U.S. 228 (1979)	4, 5
Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd per curiam*, 49 U.S.L.W. 4782 (1981)	9, 11
Imbler v. Pachtman, 424 U.S. 409 (1976)	7
Marbury v. Madison, 1 Cranch 137 (1803)	9
Sonntag v. Dooley, 650 F.2d 904 (7th Cir. 1981)	9, 10, 11
United States v. Lee, 106 U.S. 196 (1882)	6

CONSTITUTION:	
United States Constitution, Amendment I	4
United States Constitution, Amendment IV	11
United States Constitution, Amendment V	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-469

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36, written consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO, files this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by Petitioner, William C. Bush.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor union having approximately 300,000 members. AFGE represents approximately 700,000 civilian employees of the federal government. AFGE is the largest labor organization of non-postal federal employees, representing employees in nearly every major department and agency of the federal government. In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents grievances and complaints including court actions, and carries on legislative activity to improve the welfare of the employees it represents. AFGE has nearly 50,000 members who are employed in the states within the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit Court of Appeals has held in *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), that Petitioner Bush cannot recover damages from his supervisor (the Respondent in this action) for violating Bush's constitutional rights, due to the existence of an employer-employee relationship between Respondent and Petitioner. At all times material to this action, Petitioner was an aerospace engineer employed at the Marshall Space Flight Center, and Respondent was the Director of the Marshall Space Flight Center (Pet. 10). The Marshall Space Flight Center is a field facility of the National Aeronautics and Space Administration, an agency of the federal government. The Fifth Circuit's opinion denies thousands of AFGE members employed within the Fifth Circuit the right to recover damages for civil rights violations from federal officials.

Even more egregious is the fact that the Fifth Circuit's opinion can be read as denying federal employees

the right to recover damages for constitutional violations from any federal official, whether employed in the same or a different federal agency. Not being limited to instances when an employer-employee relationship may be found to exist between individuals employed within the same federal agency, the Fifth Circuit's opinion could be read as holding that a federal employee cannot recover damages for constitutional violations from any other federal employee, including law enforcement officials. An employer-employee relationship could be found whenever all of the persons involved in a civil rights violation work for the government of the United States, even when there is no regular employment relationship between the individuals.

AFGE has always been active in protecting the constitutional rights of federal employees and working to insure that federal employees are not denied constitutional rights and privileges enjoyed by other citizens. In this case, AFGE's concern is that civil rights be bolstered by remedies adequate to correct and deter civil rights violations. By taking away the most expedient remedy federal employees have to rectify violations of their constitutional rights, the Fifth Circuit has weakened the constitutional rights of all federal employees.

AFGE is committed to the protection of the constitutional rights of federal employees, and to obtaining redress for federal employees whose constitutional rights have been violated. This commitment is especially strong when the perpetrators of such violations are officials of the federal government. Additionally, AFGE upholds the principle that the right of public sector employees to be made whole for wrongs done to them is no less than that of any citizen who is employed in the private sector. Therefore, AFGE has a direct and compelling interest in the outcome of this litigation.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS CONCERNING THE RIGHT OF FEDERAL EMPLOYEES WHOSE CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY FEDERAL OFFICIALS, TO RECOVER DAMAGES AGAINST THE OFFICIALS IN FEDERAL COURT.

In 1971, this Court held that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court, despite the absence of any statute conferring such a right. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

This Court elucidated the two situations which would defeat a *Bivens* cause of action in particular cases in *Carlson v. Green*, 446 U.S. 14 (1980). As stated by this Court in Carlson:

> "The first is when defendants demonstrate "special factors counseling hesitation in the absence of affirmative action by Congress." Id., 403 U.S., at 396, 91 S.Ct., at 2004; *Davis v. Passman*, 442 U.S. 228, 245, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979). The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens*, 403 U.S., at 397, 91 S.Ct., at 2005; *Davis v. Passman*, 442 U.S., at 245-247, 99 S.Ct., at 2277-2278."

446 U.S. at 18.

In *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), Petitioner sought a *Bivens* remedy against Respondent. Petitioner claimed that a demotion action was initiated against him by Respondent in retaliation for Petitioner's exercise of his First Amendment rights. (Pet. 13-14). The Fifth Circuit held that Petitioner does not have a *Bivens* remedy against Respondent, due to the applica-

bility to his case of the first *Bivens* exception set forth by this Court in *Carlson*. The Court held in *Bush*:

> ". . . the Government employer-employee relationship present in this case is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress . . . absent more explicit direction from Congress, a *Bivens* remedy should not be inferred."

467 F.2d at 577.

The Fifth Circuit reached this result by distinguishing between the role of the government as sovereign over private citizens, and its role as an employer. *Id.*, at 576. Such a distinction, in the context of individual constitutional rights and remedies, is inapposite. It erodes the civil rights of federal employees, giving them constitutional rights while denying them the remedy necessary to fully enforce those rights.

This Court has held in *Davis v. Passman*, 442 U.S. 228 (1979), that a Congressman may be liable to his employees under a *Bivens* cause of action. This Court held in *Carlson* that federal officials may be liable to federal prisoners under a Bivens cause of action. In terms of *Bivens* liability, the Fifth Circuit would subject executive branch officials to less liability than Congressmen. Federal prisoners would have a greater ability to recover *Bivens* damages than federal employees.

In finding the existence of an employer-employee relationship to be a special factor counseling hesitation in inferring a *Bivens* remedy, the Fifth Circuit expressed a fear that the availability of a *Bivens* remedy to federal employees:

> ". . . would tend to interfere with and undermine that traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of

> the opportunity to work out its personnel problems within the framework it has so painstakingly established."

Bush, 647 F.2d at 577.

Initially it should be noted that the Fifth Circuit's concern ignores the principle that the federal government is not immune from federal law, no matter how expedient such immunity might be. This Court has stated in *Butz v. Economou*, 438 U.S. 478 (1978):

> "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> > 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it.' *United States v. Lee*, 106 U.S., at 220, 1 S.Ct., at 261."

Id., at 506.

The obligation to abide by the law implies a duty to defend againt allegations of illegal actions. In this regard, the inconvenience to federal officials of having to defend against *Bivens* actions, cannot be regarded as sufficient interference with the performance of their official duties to warrant the finding of a special factor counseling hesitation. The qualified immunity accorded to federal officials by *Butz*, provides adequate protection from undue interference. *Carlson*, 446 U.S. at 19.

The Fifth Circuit's concern that the availability of a *Bivens* remedy to federal employees would discourage their use of statutory and administrative remedies is unfounded. The statutory and administrative remedies available to a federal employee who has been demoted for exercising his constitutional rights would enable the employee to be reinstated, and to recover back pay. However, a *Bivens* remedy uniquely serves other important

purposes as well. In discussing the effectiveness of a *Bivens* remedy (as opposed to the statutory right to damages under the Federal Tort Claims Act (FTCA)) this Court stated in *Carlson*:

> ". . . the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. See *Butz v. Economou*, 438 U.S. 478, 505, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978). Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, *Imbler v. Pachtman*, 424 U.S. 409, 442, 96 S.Ct. 984, 1000, 47 L.Ed. 2d 128 (1976) (WHITE, J., concurring in the judgment), surely particularly so when the individual official faces personal financial liability . . ."

466 U.S. at 21.

This Court also noted in *Carlson*:

> ". . . our decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be awarded in a *Bivens* suit. Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005, and are especially appropriate to redress the violation by a government official of a citizen's constitutional rights . . ."

Id.

Additionally, under a *Bivens* cause of action a plaintiff has the right to a jury trial. *Id.*, at 22.

A *Bivens* cause of action clearly provides relief to federal employee victims of constitutional violations which is not provided by existing statutory or administrative remedies. These other remedies merely supplement the *Bivens* remedy, and by no means preclude it. Even a federal employee such as Petitioner, who has been successful in the use of his other avenues of relief,

needs the ability to recover damages under *Bivens* in order to be made whole for his injuries.[1]

The danger of the Fifth Circuit's denial of a *Bivens* remedy to federal employees lies not only in its preclusion of damages suits by subordinate employees against their supervisors. *Bush* could be interpreted to preclude *Bivens* actions by federal employees against any federal officials, e.g., a federal law enforcement agent conducting an illegal search and seizure.

The employer-employee relationship which existed between Petitioner and Respondent was that of an employee and the director of a federal activity, not the employee's immediate supervisor. The Fifth Circuit did not state the point, if any, within the federal government at which it would consider the employer-employee relationship too attenuated to justify precluding a *Bivens* cause of action. In its broadest sense, the employer-employee relationship referred to in *Bush* could be deemed to exist between any two employees of the Executive Branch, even if they have no employment related contacts with one another. The *Bush* decision leaves open the possibility that federal employees will be denied a damages remedy for any constitutional violation committed against them by any agent of the United States. That is not the result this Court intended when it determined that there may exist situations in which a *Bivens* cause of action against federal officials should be precluded.

Without being able to make use of all necessary remedies for the violation of their constitutional rights, the rights of federal employees are made inferior to those held by other citizens. As this Court has stated:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protec-

---

[1] Petitioner was reinstated by the Civil Service Commission's Appeals Review Board in July of 1978, and granted back pay, three years after his demotion. (Pet. 12).

> tion of the laws, whenever he receives an injury. *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803)."

Bivens, 403 U.S. at 397.

There are present in this case no "special factors counseling hesitation" which would preclude Petitioner from maintaining a *Bivens* cause of action against Respondent. The Fifth Circuit misinterpreted *Bivens*, and *Carlson*, in holding that the existence of an employer-employee relationship between Petitioner and Respondent constituted such a special factor.

The issues presented by this case affect the ability of millions of federal employees to obtain adequate remedies for violations of their civil rights and to deter such violations. These issues will recur throughout the United States, as federal employees attempt to redress violations of their civil rights by federal officials through the use of damages suits filed pursuant to *Bivens*. A decision by this Court in the instant case would be determinative of the remedies available to federal employees, and the liability of federal officials, when such violations occur.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE RIGHT OF FEDERAL EMPLOYEES WHOSE CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY FEDERAL OFFICIALS, TO RECOVER DAMAGES AGAINST THE OFFICIALS IN FEDERAL COURT.

The holding of the Fifth Circuit in *Bush* that a federal employee may not maintain a cause of action under *Bivens*, is squarely contrary to the decision of the U.S. Court of Appeals for the Seventh Circuit in *Sonntag v. Dooley*, 650 F.2d 904 (7th Cir. 1981). It is also contrary to the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd. per curiam*, 49 U.S.L.W. 4782 (1981).

In *Sonntag*, plaintiff was a civilian employee of the U.S. Army working at Fort Sheridan, Illinois. She sued the Director of Plans, Training and Security at Fort Sheridan. The action was based upon violations of plaintiff's Fifth Amendment rights in relation to her being coerced into retiring from the federal service. Plaintiff sought monetary damages from defendant.

In reversing the district court's dismissal of plaintiff's action, and holding that a *Bivens* action could be maintained by a federal employee against a federal official, the Seventh Circuit stated:

> ". . . defendants have not demonstrated 'special factors counseling hesitation' under *Carlson* because they do not enjoy 'such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate' and because 'even if requiring them to defend [plaintiff's] suit might inhibit their efforts to perform their official duties,' their qualified immunity provides adequate protection for them. *Carlson v. Green, supra*, at 19, 100 S.Ct. at 1472."

Sonntag, 650 F.2d at 907.

The holding of the Seventh Circuit in *Sonntag* that a federal employee may bring a *Bivens* action against a federal official cannot be reconciled with the holding of the Fifth Circuit in *Bush*.[2]

---

[2] The Seventh Circuit stated that as the plaintiff in *Sonntag* had no alternative remedies available, she could maintain a *Bivens* action even "assuming" that the district court was correct in concluding that a *Bivens* remedy cannot be used when alternative remedies are available. This assumption by the Seventh Circuit does not alleviate the conflict between *Bush* and *Sonntag*. The Seventh Circuit did not hold as a matter of law that the existence of alternative remedies would preclude a *Bivens* cause of action. Nor did the Seventh Circuit hold that the existence of alternative remedies would activate the *Bivens* exception upon which the Fifth

In *Halperin*, a former employee of the National Security Council and his family brought suit against ten federal officials for money damages. It was alleged that the officials had violated plaintiffs' Fourth Amendment rights by placing a wiretap on plaintiffs' home telephone. The D.C. Circuit cited *Bivens* for the principle that the ordinary remedy for an invasion of personal interests in liberty is damages. 606 F.2d at 1207. The D.C. Circuit then stated:

> "The instant suit is squarely within this tradition, and the Halperins are 'entitled to recover money damages for any injuries [they have] suffered as a result of the . . . violation of the [Fourth] Amendment . . .'"

Id., (footnotes omitted).

In *Halperin*, a federal employee was allowed to maintain a *Bivens* action against both his supervisor, the National Security Advisor, and the President of the United States. The Fifth Circuit's decision in *Bush* would preclude such suits, and is therefore in conflict with *Halperin*.

These conflicts justify the grant of certiorari to review the judgment below.

Circuit relied, the existence of "special factors counseling hesitation."

AFGE asserts that there is no remedy currently available to federal employees which is a substitute for, or alternative to, a *Bivens* action. This is due to the fact that a *Bivens* remedy is so much more effective than any other remedy available to federal employees whose civil rights have been violated. See page 7, *supra*; *Carlson*, 446 U.S. at 21.

The "alternative remedies" argument being moot, there are no circumstances under which *Bush* and *Sonntag* could be in accord with one another.

CONCLUSION

For the aforesaid reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

MITCHELL JAY NOTIS
Staff Counsel

MARK D. ROTH
Assistant General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700 Ext. 311
Attorneys for *Amicus Curiae*

November 1981

Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,

v.

WILLIAM R. LUCAS,
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

WILLIAM HARVEY ELROD, JR.
205 Holly Street, N.E.
Decatur, AL 35601
(205) 355-3731
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-6477

QUESTIONS PRESENTED

1. Does a plaintiff's status as a civilian employee of the federal government preclude a *Bivens*-type suit by such plaintiff personally against another federal civilian employee personally, for such defendant's alleged violation of that plaintiff's First or Fifth Amendment rights in course of that defendant's procuring of that plaintiff's demotion?

2. Does administrative relief with respect to such demotion, *qua* personnel action, pre-empt a *Bivens*-type suit by the improperly demoted federal civilian employee, as an individual person, against the individual person who, while purporting to act in his official executive position with the federal government, allegedly conspired with others to procure the demotion in retaliation for the plaintiff's publicly commenting upon personnel and management practices at the governmental facility where both parties were employed and which the defendant headed?

PARTIES TO THE PROCEEDING BELOW

The only parties to the proceeding in the courts below were those listed in the caption of the case in this Court—viz., William C. Bush, Petitioner, and William R. Lucas, Respondent.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding Below	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes and Regulations Involved	2
Statement of the Case	3
Summary of Argument	13
Argument	15
Conclusion	29
Appendices:	
A. Denial of rehearing, *Sonntag* v. *Dooley*, No. 80-2435, 7th Cir., Sep. 14, 1981	A-1
B. MS memorandum and order, *McAnaw* v. *Custis*, No. 81-4137, D. Kans., 15 Jan. 1982	B-1

TABLE OF AUTHORITES

United States Constitution

U.S. CONST. art. III, § 2, cl. 1 2

U.S. CONST. amend. I ..... *passim*

U.S. CONST. amend. V i,2

Statutes

5 U.S.C. §§ 1301, 1302 and 3302 2,27

Back Pay Act, 5 U.S.C. § 5596 (1966) 2,17n,18n,25,27,29

5 U.S.C.S. § 5596 n. 18n

5 U.S.C. § 7511 2

5 U.S.C. §§ 7701 and 7716 2,25,26,27

Civil Rights Act of 1964 28

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 .....17,18,18n,21,25n,26,28

Federal Tort Claims Act 27,29

Lloyd-LaFollette Act of 1912, ch. 389, 37 Stat. 555 .... 17n

Pendleton Act (Civil Service Act) of 1883, ch. 27, 22 Stat. 403 ..... 17n

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331(a) 2

42 U.S.C. § 1983 26

42 U.S.C. § 2472 5

Tit. 7, §26, Ala. Code 1940; § 6-2-39(a), 1975 ..... 10n

Veterans' Preference Act of 1944, 58 Stat. 387 25,29

Cases

Abood v. Detroit Board of Ed., 431 U.S. 209 (1977) ... 20

Barr v. Matteo, 360 U.S. 564 (1959) 4,4n,11

Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979) 26

Bergeron v. Goldman, 64 F.2d 917 (5th Cir. 1933) 26

Bernasconi v. Tempe Elementary School Dist. No. 3., 548 F.2d 857 (9th Cir. 1977), *cert. denied*, 434 U.S. 825 (1978) 19

Berry v. Macon County Board of Education, 380 F. Supp. 1244 (M.D. Ala. 1971) 19

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Brown v. GSA, 425 U.S. 820 (1976) 28

Butz v. Economou, 438 U.S. 478 (1978) ..... *passim*

Bush v. Lucas, 598 F.2d 958 (5th Cir. 1979), *vacated*, 446 U.S. 914 (1980) 1,4,12,18,27

Bush v. Lucas, 647 F.2d 573 (5th Cir. 1981), *cert. granted*, 457 U.S. ____, 102 S.Ct. 3481 (1982) ..... *passim*

Califano v. Sanders, 430 U.S. 99 (1977) 19

Carlson v. Green, 446 U.S. 14 (1980) ..... *passim*

Carroll v. United States, 522 F. Supp. 458 (N.D. Tex. 1981) 23n

Cruz v. Beto, 405 U.S. 319 (1972) 19

CSC v. National Ass'n of Let. Car., 413 U.S. 548 (1973) 18

Davis v. Passman, 442 U.S. 228 (1979) ..... *passim*

Elrod v. Burns, 427 U.S. 347 (1976) 20

Fitzgerald v. United States Civil Service Commission, 554 F.2d 1186 (D.C. Cir. 1977) 25

Francisco v. Schmidt, 532 F. Supp. 850 (E.D. Wis. 1982) 22n

Harlow v. Fitzgerald, 457 U.S. ____, 102 S. Ct. 2727 (1982) 16,22n

Hawkins v. Collins, 5 Ala. App. 522, 59 So. 694 (1912) . 26

Hurley v. United States, 624 F.2d 93 (10th Cir. 1980) ... 29

Jaffe v. United States, 663 F.2d 1226 (3d Cir. 1981) (en banc), *petition for cert. filed* 22n

Keyishian v. Board of Regents of New York, 358 U.S. 589 (1967) 20

Killebrew v. Carlisle, 97 Ala. 535, 12 So. 167 (1893) 26

McAnaw v. Custis, No. 81-4137, MS (D. Kans. Jan. 15, 1982) (App. B) 2,23n,B-1

McCarthy v. Philadelphia Civil Service Comm'n., 424 U.S. 645 (1976) 18

Melvin v. Pence, 130 F.2d 423, 143 A.L.R. 149 (D.C. Cir. 1942) 26

Morris v. United States, 595 F.2d 591 (Ct. Cl. 1979) 29

Owen v. City of Independence, 445 U.S. 622 (1980) 17

Payne v. Panama Canal Co., 607 F.2d 155 (5th Cir. 1979) 25,26,28

Perry v. Sinderm[illegible]n, 403 U.S. 593 (1972) 19

Pickering v. Board of Education, 391 U.S. 563 (1968) ... *passim*

Pred v. Board of Instruction of Dade County, Fla., 415 F.2d 851 (5th Cir. 1969) 19

Procunier v. Martinez, 416 U.S. 396 (1974) 19

Purtill v. Harris, 658 F. 2d 134 (3d Cir. 1981), *petition for cert. filed,* Nov. 23, 1981 ..... 22n

Savings and Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 455 (1875) 17

Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976) 19

Sonntag v. Dooley, 650 F.2d 904 (7th Cir. 1981), *reh'g denied,* No. 80-2435, Sept. 14, 1981 (App. A) ..ii,22n,23n, A-1

United States v. Lee, 106 U.S. 196 (1882) 17

United States v. Testan, 424 U.S. 392 (1976) 28

United States Fidelity & Guaranty Co. v. Miller, 218 Ala. 158, 117 So. 668 (1928)..... 26

Wieman v. Updegraff, 344 U.S. 183 (1952) 16

Rules and Regulations

5 C.F.R. Parts §§ 550, 752 and 772 (1975) 2,28

Civil Service Rule V, § 5.1, Exec. Ord. No. 10577, 19 Fed. Reg. 7521 (1956) 2,28

Rule 38(b), Fed. R. Civ. P..... 27

Texts

Antieau, C., 1 *Federal Civil Rights Acts* § 210 (2d ed. 1980) 26

Goodman, *Handbook on Public Personnel Law* 177, 212 (1978) 25

Restatement of Torts, §§ 680 and 681 26

No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,

v.

WILLIAM R. LUCAS,
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

The court of appeals' opinion on remand appears at 647 F.2d 573 (5th Cir. 1981). That court's original opinion appears at 598 F.2d 958 (5th Cir. 1979). A copy of the district court's unpublished memorandum of opinion appears in Appendix D, at d-2—d-17, to the petition.

JURISDICTION OF THIS COURT

Entry of the judgment of the court of appeals on remand occurred on 12 June 1981. (J.A. 3.) The filing of the petition for certiorari followed on 4 September 1981. The petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the following constitutional provisions, statutes, rules and regulations, the relevant parts of which are set forth in Appendix H to the petition for certiorari:

U.S. CONST. art. III, § 2, cl. 1;

U.S. CONST. amend. I;

U.S. CONST. amend. V;

5 U. S. C. §§1301, 3302, 5596, 7511 and 7701;

28 U. S. C. §1331(a) (1976);

Civil Service Rule V, §5.1, Exec. Ord. No. 10577, 19 Fed. Reg. 7521 (1956);

5 C.F.R. §§752.101, 752.104, 752.202, 752.203, 752.401, 772.101, 772.102, 772.301, 772.305, 772.307—772.310 and 772.312 (1975).

STATEMENT OF THE CASE

This is a *Bivens*-type damage suit[1] between two natural persons in their individual capacities. (Summons, J.A. 3; Complaint, Count Four, J.A. 4—7). Both the parties, whom we hereafter call by their respective surnames only, are civilian employees of the United States Government. (¶¶1 and 2, Count Four, J.A. 4—5; Lucas Affid., J.A. 13, 14; Bush Affid., J.A. 29 at 30; Lucas Dep. 8, 10, 11, 24, 103, J.A. 41, 42, 47, 79.) Bush bases his *Bivens*-type claim upon a conspiracy (¶¶2 through 6, Count Four, Complaint, J.A. 4—7) allegedly participated in by Lucas while "purporting to act in his official capacity as Director of the George C. Marshall Space Flight Center...." (first ¶2, Count Four, Complaint, J.A. 4—5).

---

[1] I. e., this is an action brought directly under the Constitution and seeking to recover damages for wrongful invasion or abridgement of constitutional rights—specifically, rights to be free from retaliatory civil service demotion and other steps taken by way of punishment for the petitioner-plaintiff's having "let ... members of Congress, members of the press and some few members of the public know of the waste which he observed to be rampant at Marshall Space Flight Center." (¶6, Count Four, Complaint, J.A. 7.) *See Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as amplified, since the filing of this suit, in *Davis* v. *Passman*, 442 U.S. 228 (1979), and in *Carlson* v. *Green*, 446 U.S. 14 (1980). Upon prior petition for certiorari, this Court remanded this case to the Fifth Circuit for reconsideration in the light of *Carlson*. (446 U.S. 914 [1980].)

In addition to the final count setting forth the *Bivens*-type claim, the complaint in this case includes three counts in defamation. (R. 5—7). As counsel for Lucas correctly note (Brief for Respondent in Opposition to Petition for Certiorari, 3 n.2), the Fifth Circuit has twice sustained the district court's ruling that the respondent is entitled to absolute immunity as to the defamation claims; and the questions which Bush now presents relate only to the lower courts' disposition of the *Bivens*-type claim. The defamation counts remain in the record.

The Decision Under Review

The United States Court of Appeals for the former Fifth Circuit has found, in terms, "that the Government employer-employee relationship present in this case is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress." (647 F.2d 573 at 577 [1981]; Pet. App. A at a-12.) Upon the basis of such finding—coupled with *Carlson's* apparent lack of impact upon *Barr* v. *Matteo*—,[2] the former Fifth Circuit has reaffirmed (J.A. 3) its prior decision (598 F.2d 958 [5th Cir. 1979]; Pet. App. C at cl-1 through cl-14) as intermediately vacated by this court (446 U.S. 914 [1980]). In so reaffirming its own original decision, that court of appeals also again affirmed (J.A. 3) the 4 February 1977 order of the United States District Court for the Northern District of Alabama granting Lucas' motion for summary judgment (J.A. 95). That motion (J.A. 12—13) first set forth the general ground of a failure to state a claim, etc., and then invoked a doctrine of absolute immunity as enveloping all that Lucas had done within the outer perimeter of his duties as Director of the George C. Marshall Space Flight Center, which we hereinafter call "MFSC."

The Employment Relationship, Environment and Related Events

Both Bush and Lucas have been at MSFC for a number of years. (J.A. 4—5, 17—18.) Bush has been employed there as an aerospace engineer. (J.A. 4, 13—14.) Lucas has been the Director of MSFC since mid-1974. (J.A. 17—18, 86.) MSFC is one of

---

[2] In its first affirmance (598 F.2d 958, 959, 960) of the district court's according Lucas absolute immunity with respect to Bush's defamation claims, the former Fifth Circuit relied upon *Barr* v. *Matteo*, 360 U.S. 564 (1959), and *Butz* v. *Economou*, 438 U.S. 478 (1979). It also cited *Gossett* v. *Du-Ra-Kel Corp.*, 569 F.2d 869, 872-873 (5th Cir. 1978).

several major field facilities (J.A. 18, 43) maintained by the National Aeronautics and Space Administration, which we hereinafter call "NASA." Lucas has been with NASA since 1960. (J.A. 42.) NASA is a part of the United States Government. (42 U.S.C. §2472.)

In course of a major reorganization in 1974, MSFC management assigned Bush to a new position. (J.A. 30; Pet. App. E at e-3.) Bush found few if any actual duties corresponding to the description of the position. (J.A. 30.) Intra-organizational efforts to induce MSFC management to change or abolish the position were unavailing. (*id.*) In separate appeals to the Civil Service Commission, which we hereinafter call "the CSC," Bush assailed both the classification of the position and his assignment to the position.

In the spring of 1975, and while *those* administrative "appeals" were pending (Pet. App. E at e-4—e-5; Pet. App. F at f-18), the media attributed several public statements to Bush to the effect that his position description had been written improperly " 'to support the GS-15 branch chief,' and was a 'falsehood, a travesty and worthless'; ... that he was reporting what 'appear[ed] to be a fraudulent use of Federal funds ....'; that he did not have enough meaningful work to keep him busy; that he spent no more than thirty minutes to an hour each day on official work; and that his job was unnecessary and should be abolished to save the taxpayers' money." (J.A. 13—14, and see J.A. 31.)

Bush's public statements "greatly disturbed" Lucas, both by virtue of their content and by virtue of "the fact that they came to ... [his] attention initially through newspaper articles and television broadcasts." (J.A. 14.) "Consequently, ... [Lucas] took the following action: First, ... [he] asked ... [his] subordinate managers with cognizance over ... Bush's function to look into the matter and report to ... [Lucas]; Second ..., [he]

requested that an independent investigation into ... Bush's allegations be conducted by the NASA Inspections Division." (*id.;* and see, further, J.A. 31—32.) Lucas assigned the initial, internal, investigation to a Mr. James E. Kingsbury, who was the Director of Science and Engineering at MSFC (J.A. 44) and whom we hereinafter call "Kingsbury." Several days later (J.A. 52, 53), Lucas told (J.A. 53) his subordinate Mr. John Potate (J.A. 45), whom we hereinafter call "Potate," to undertake to obtain the second, or "independent [,] investigation into ... Bush's allegations ... by the NASA Inspections Division" (J.A. 14, 53).[3]

Lucas received periodic reports from Kingsbury and Potate as to the progress of the respective investigations. (J.A. 32, 45, 56, 59, 80 and 81.) Kingsbury's interim progress reports on the internal investigation probably were oral. (J.A. 80.) As Lucas recalled (J.A. 44, 45), the NASA Inspection Division's (J.A. 14) Dr. [or Mr.] Olsen (J.A. 44, 53, 80) did not complete the second, or independent, investigation until around 1 July 1975. (J.A. 44, 45.)

That second investigation was still in progress (J.A. 45) on 25 June 1975 when, in response to questions asked him by a television reporter, Lucas said that he had had Bush's statement that Bush had no meaningful work to do investigated and that Lucas could " 'say unequivocally that such a statement ha[d] no basis in fact.' " (J.A. 15; and see J.A. 74—75.) Lucas later swore (J.A. 16—17) that he had based such statement on his part "upon the assurances ... [he] had received from the above-

---

[3] In the course of the taking of his deposition upon oral examination in this case, Lucas testified that the second investigation by NASA's Mr. [or Dr.] Olsen, was "[i]ndependent ... in the sense that ... [Olsen did not] report to ... [Lucas]." (J.A. 53.) Olsen was "the NASA inspection representative ... [at MSFC.]" (*id.*) He "report[ed] to NASA Headquarters." (*id.*)

mentioned investigations...." (J.A. 15.) He further swore that "[a]s a result of both investigations, ... [he] was assured that ... Bush did have a valid job description; that the function for which ... [Bush] was responsible was necessary to fulfill ... [MSFC's] missions; that ... [Bush] did have enough meaningful work to keep him busy; and that, in fact, ... [Bush] had been putting in a reasonable day's work." (J.A. 14.) Lucas still later (J.A. 39—40) swore that such assurance had come in part from Kingsbury "on the basis of ... [Kingsbury's] investigations [,] which ... [Lucas] presumed ... [Kingsbury] got from other sources...." (J.A. 59) and in part "from ... Potate [,] who obtained it from ... Olsen, whom ... [Lucas] presume[d] got it from several other sources." (*id.;* and see, also, J.A. 45).

Lucas did not ask Potate to obtain an independent investigation of the impact of Bush's public statements. (J.A. 56.) As Lucas understood the matter, the Olsen investigation essentially had been directed toward ascertaining whether Bush did have " 'meaningful work to do.' " (*id.*) Lucas could not judge whether Bush's public statements constituted any threat to MSFC's mission. (J.A. 50.) When counsel for Bush asked Lucas, at the taking of the latter's deposition upon oral examination in this case, whether Bush's public remarks substantially complicated Lucas' task as Director of MSFC, Lucas responded to the effect that it was his judgment that such of the remarks as were false and misleading depressed morale at the center and adversely affected "the attitudes and respect of the people in ... [MSFC] ... for ... [MSFC] ..."; and, further, that it had been his judgment that the remarks "would affect the productivity of ... [MSFC] ..." (J.A. 70.) Lucas further recalled, at the taking of his deposition upon oral examination, that, in response to a question asked him at the intervening CSC hearing, he had "named a few people that ... [he] had had some expressions from, and [that he then, at the CSC hearing, had] ... indicated that it was ... [his] judgment that such statements would affect the morale of the people." (*id.*)

Agency's Adverse Personnel Action

About a month, or slightly more, after Olsen completed his investigation (J.A. 44—45), Kingsbury, as Director of MSFC's Science and Engineering Directorate, gave Bush formal notice of a proposed adverse action to remove Bush from his position (J.A. 15; Pet. App. F at f-2.) The notice bore date of 1 August 1975. (*id.*) The assigned grounds for such proposed removal were Bush's prior public statements, which the notice of proposed adverse action characterized as "intemperate ...[,] misleading and often false..." (Pet. App. F at f-2) and, further, as "evidencing a malicious attitude towards Management and generating an environment of sensationalism demeaning to the Government, the National Aeronautics and Space Administration and the personnel of ...[MSFC]...." (*id.*, at f-2—f-3.) Charge 1 of the notice further stated that, by making such remarks, Bush had "imped[ed] ... government efficiency and economy and adversely affect[ed] ... public confidence in the Government service...." (*id.*) There followed several pages of specifications detailing Bush's prior statements and conduct sought to be made the basis of his removal. (*id.*) Lucas later swore that he did not "become involved in ... [the adverse action] until ...Kingsbury had decided what to do about the matter, or recommended [the adverse action.]" (J.A. 69.) Lucas had seen a draft of the notice, and discussed it with Kingsbury, after having heard, from MSFC's legal office, that the MSFC Science and Engineering Directorate "was recommending action against ...Bush...." (*id.*) Lucas said, however, that he "did not engage in that [earlier] discussion with ... Kingsbury [as intermediately reported to Lucas by the MSFC legal office.]" (*id.*)

After Bush's written and oral responses (mentioned at Pet. App. E, e-6) to the notice of proposed adverse action, Lucas, as agency deciding official, reduced Bush's general schedule grade from GS-14 to GS-12 and transferred Bush to a different posi-

tion at MSFC. (J.A. 15; Pet. App. E at e-1.) The attendant reduction in Bush's annual pay was on the order of $9716.00. (Pet. App. E, e-1.) The effective date of the adverse action and pay reduction (Pet. App. E, e-40—e-41) was 30 November 1975 (*id.* at e-1). Lucas later said that, as of the time that he decided to take the adverse action, he understood that the purpose of the action was "disciplinary or a penalty for having made the false and misleading statements." (J.A. 73.) Lucas was of the view that certain of the reasons assigned in the advance notice of proposed adverse action "were sufficient to warrant ... Bush's removal in order to promote the efficiency of the service." (J.A. 15.) Since, however, Bush's statements constituted his "first offense of record, ... [Lucas] decided to reduce the penalty to a reduction-in-grade ... and to transfer ... [Bush] [within the MSFC] organization." (*id.*) Lucas later testified that he gave no consideration to either the deterrent effect or the institutional impact, at MSFC, of the decision. (J.A. 74.) Lucas read Olsen's written report and "quoted some of the things that he had found" in Lucas's decisional letter (J.A. 81) of November 25, 1975 (J.A. 15).

Administrative Review of Agency Personnel Action

Bush timely appealed the adverse personnel decision to the CSC. (Pet. App. E at e-1, e-2.) While finding the advance notice to have been procedurally defective with respect to one of the two principal charges (Pet. App. E at e-11, e-12), the initial CSC decision sustained the agency action (*id.* at e-41) on the basis of the other charge—viz., that Bush "did on more than one occasion publicly make statements which were misleading ...." (*id.* at e-12, as qualified at e-12 and e-13). Accordingly, the CSC's first-tier review tribunal on 12 August 1976 affirmed the reduction-in-grade. (*id.* at e-42.) On Bush's petition, however, the CSC's Appeals Review Board, as that body was called in July of 1978, rendered a decision (Pet. App. F) reversing (*id.* at f-25)

the initial CSC decision and recommending that Bush be restored "to his former position, grade ... and pay, retroactively to November 30, 1975." (Pet. App. F at f-26.) Applying a *Pickering*[4]-type balancing test, the Appeals Review Board based its decision upon a perceived unjustifiable "abrogation of the exercise of free speech." (*id.* at f-25.) After the Civil Service Commissioners' 10 October 1978 denial (Pet. App. G at g-2) of NASA's 21 August 1978 petition to reopen the Appeals Review Board's decision, MSFC took the corrective action recommended by the Board. (See Brief for Respondent in Opposition to Petition, 3 n.1.)

The Damage Suit

Administrative review of Bush's reduction-in-grade lasted from December of 1975 (Pet. App. E at e-1) until October of 1978 (Pet. App. G at g-1.) While such review was still pending at the first level of the CSC's appellate hierarchy, and on the day before an Alabama statute of limitations[5] might have barred at least the defamation claims, Bush sued Lucas individually in a state court. (J.A. 3—7.) In this suit, Bush seeks to recover damages from Lucas for, among other wrongs, Lucas' having conspired with others, "while purporting to act in his official capacity as Director of ... [MFSC],... to deprive ... [Bush] of his constitutional rights of freedom of speech and of petition to Congress ...." (First ¶2, Count Four, Complaint, J.A. 4—5.) According to subsequent averments of Bush's complaint, the conspiratorial violations of his First Amendment rights "have consisted in the efforts of ... [Lucas] and his co-conspirators, in

---

[4] *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

[5] Tit. 7, §26, Ala. Code 1940 as "Recompiled"—now distributed, in relevant part, among Subdivs. (1), (4) and (5) of §6-2-39(a), Ala. Code 1975, effective 31 October 1977. Bush sued on 24 June 1976. (J.A. 8, 21, 27.)

pursuance of ... [a] common intent of continuing waste of public funds and forces ... without accounting therefor, to squelch ... [Bush] in his letting members of Congress, members of the press and some few members of the public know of the waste which he observed to be rampant at ... [MSFC]." (¶6, Count Four, Complaint, J.A. 7.) Bush claims that "[f]or having so expressed himself, ... [he] has been punished by ... [Lucas] ... by being demoted ... and by being denounced as, in effect, a liar in advance of any hearing upon the charges ultimately made against ... [him]." (*id.*) He also claims that he incurred great expense in seeking administrative redress. (J.A. 6.)

On 9 July 1976, Lucas removed the suit to the United States District Court for the Northern District of Alabama. (J.A. 1, 8—11.) Without answering the complaint, he then moved alternatively for dismissal of the complaint or for summary judgment. (J.A. 1, 12—22.) After Bush's interim (J.A. 23—37) and supplemental (J.A. 82—87) responses to Lucas' motion, and after the limited (J.A. 37—38) discovery (J.A. 38—82) permitted by the district court, that court granted Lucas' motion on or about 4 February 1977. (J.A. 95; and see J.A. 2.) In a memorandum-opinion (Pet. App. D at d-2—d-17), the district court considered the defamation claim and the conspiracy claim discretely. Treating the former as having no constitutional overtones or implications (*id.* at d-7, d-8), the district court regarded *Barr* v. *Matteo* as controlling (*id.* at d-4) on the point of Lucas' immunity to suit on that claim, as discretely considered.

While regarding the conspiracy claim as asserting violations of Bush's constitutional rights and as being "based on the seminal case of *Bivens* v. *Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388 (1971) ..." (Pet. App. D at d-12), the district court nevertheless concluded that the availability of administrative relief, albeit from the Government and not from Lucas (*id.*, d-15, n.5), precluded Bush from maintaining suit against Lucas for "damages based," as the district

court said, "on ... [Bush's] demotion, allegedly contrived as a punishment for ... [Bush's prior public] statements" (*id.* at d-16).

On 7 March 1977, Bush appealed to the United States Court of Appeals for the Fifth Circuit. (J.A. 96.) Between the time that Bush took that appeal and the time that the Fifth Circuit reached the case for oral argument, the administrative review of the adverse personnel action had run its course and Bush had been restored in grade, with back pay, etc. (Pet. App. F at f-25—f-26; Pet. App. G at g-1—g-3; and see Brief for Respondent in Opposition to [the present] Petition, 3 n.1.) During the same interval, this Court had decided *Butz* v. *Economou*, 438 U.S. 478 (1978), and had granted certiorari in *Davis* v. *Passman*, 439 U.S. 925 (1978). The Fifth Circuit "withheld decision" (598 F.2d 958, 959) on Bush's case "pending ... [this] Court's review of *Davis* v. *Passman*." (*id.*)

On 12 July 1979, a few weeks after this Court decided *Davis* v. *Passman*, the Fifth Circuit affirmed the district court's granting of Lucas' motion for summary judgment. *Bush* v. *Lucas*, 598 F.2d 958, *reh. denied, mem.*, 605 F.2d 554 (5th Cir. 1979). On Bush's ensuing application for writ of certiorari, this Court vacated the original judgment of the Court of Appeals for the Fifth Circuit and remanded the case to that court "for further consideration in light of *Carlson* v. *Green* ...." *Bush* v. *Lucas*, 446 U.S. 914 (1980).

On remand, the Fifth Circuit rendered the decision presently under review. *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981); and see Pet. App. A.

SUMMARY OF ARGUMENT

I. The status of a *Bivens* plaintiff as a civilian employee of the federal government is not sufficient to constitute a "special factor counseling hesitation" in the according of the *Bivens* remedy to such plaintiff. Such status may not be given such effect without unduly burdening the exercise of fundamental rights, and the redressing of violations of those rights by resort to the courts. The Government's interest as employer does not per se preclude a *Bivens*-type suit to redress constitutional deprivations occurring more or less in the context of the litigants' common employment as civil servants. Rather, that interest of the Government, *as employer,* is one of several interests to be balanced in determining which of the interests, or congeries of interests, directly asserted or implicated by or on behalf of the litigants should prevail in a particular case. Such balancing is not to be done *in vacuo*. Rather, it must take into account the concrete circumstances of the particular case.

In this particular case, Bush asserts individual interests which implicate societal interests of a very high order. While specifically seeking to obtain access to the courts to obtain further redress than that already accorded him administratively, Bush does so in order fully to vindicate First Amendment rights. The primary rights sought to be vindicated are Bush's rights to express himself publicly on matters of public concern and to petition the Government for redress of grievances. Those are fundamental rights in the preservation of which society at large has a substantial interest. Bush's status as an employee of the Government does not deprive him altogether of those rights, although such status admittedly may justify some restriction of those rights in the public interest. Such restriction, however, can be justified only upon the *demonstrated* existence of incompatibility between particular exercises of those rights and the preservation of a paramount governmental interest.

Lucas has not demonstrated the existence of such incompatibility in this case. Congress' creation of a civil service system, while certainly attended by efforts to preserve some balance between the rights of governmental employees as citizens and the interest of the Government as employer, does not evidence incompatibility between the maintenance of the efficiency of the public service and vindication of the employees' First Amendment rights by a *Bivens*-type suit. Nor does the conjuring up of potential administrative inconvenience in consequence of the according of *Bivens*-type remedies to civilian employees of the Government.

II. Administrative relief with respect to an adverse personnel action, *qua* personnel action, does not preclude Bush from maintaining a *Bivens*-type action against Lucas in the latter's individual capacity. That administrative relief was reinstatement and back-pay. At the time that Bush received such relief, the governing statutes and regulations did not authorize any award of attorneys' fees or reimbursement of expenses necessarily incurred in seeking such relief. Nor were those statutes and regulations sufficiently comprehensive or sufficiently focalized to warrant an inference that Congress meant for the statutes, as implemented by the regulations, to be the exclusive remedy for a civilian employee who had suffered a retaliatory demotion effected in reprisal for his having exercised his First Amendment rights. Moreover, such an inference, even had it been warranted, would not have constituted an explicit Congressional declaration that the statutes, with or without the regulations, were to be a substitute for a *Bivens*-type suit.

The administrative relief came from the Government pursuant to limited waivers of sovereignty. It afforded partial compensation. It afforded no deterrent.

ARGUMENT

1. A Plaintiff's Status As A Civilian Employee Of The Federal Government Does Not Preclude Him, As An Individual Person, From A *Bivens*-Type Remedy Against Another Civilian Governmental Employee As An Individual Person.

The court of appeals' opinion on remand in this case concedes that, under *Carlson's* clear teaching,

> Bush is entitled to seek a constitutional damage remedy for retaliatory demotion unless ... [Lucas] can demonstrate either that special factors are present which counsel hesitation in the absence of affirmative action by Congress, or that Congress has provided an alternative remedy which it intended as a substitute for, and considered equally effective as, a *Bivens* remedy.

Bush v. *Lucas*, 647 F.2d 573, 575 (5th Cir. 1981); and see Pet. App. A at a-5.

While professedly pretermitting, but perhaps actually preserving (*compare* Petition for Certiorari, 21 and n.6, *with* Brief in Opposition, 9—10) the pre-emptive remedy question, the court of appeals finds "that the Government employer-employee relationship present in this case is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress." (*Bush* v. *Lucas*, 647 F.2d 573, 577; Pet. App. A at a-12.) Upon the basis of such "finding," the court of appeals not only hesitates; it halts. It holds "that absent more explicit direction from Congress, a *Bivens* remedy should not be inferred." (*id.*)

A. *Governmental employment per se should not be regarded as a "special factor counselling hesitation in the absence of affirmative action by Congress."*

In its apparent preoccupation with Bush's status as a government employee, the court of appeals misapprehended the nature of Bush's suit. Bush seeks damages for the wrong done him by Lucas in abuse of the latter's power. Bush does not presently seek, indeed he already has obtained (Pet. App. F at f-25—f-26; and see Brief in Opposition to Petition for Certiorari, 3 and n.1), relief from the Government. That relief with respect to the adverse personnel action, *qua* personnel action, did not make Bush whole. Bush, the individual victim, seeks to recover the difference, plus punitive damages, from Lucas, the individual wrongdoer. At least until Congress says otherwise, the victim's and the tortfeasor's common status as civilian employees of the federal government should not shield the tortfeasor from liability for that difference, plus punitive damages. Constitutional guaranties of individual freedom ordinarily apply alike "to all persons, no matter what their calling." *Wieman* v. *Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (Fourteenth Amendment). If the coincidence of victim's and tortfeasor's having a common calling as civilian employees of the federal government is sufficient to shield the tortfeasor from liability to the victim for a *Bivens*-type tort, absolute executive immunity is in effect restored pro tanto, notwithstanding *Butz* v. *Economou*, 438 U.S. 478 (1980), and *Harlow* v. *Fitzgerald*, 457 U.S. ____, 102 S.Ct. 2727 (1982).

1. *There should be a balancing of interests prior to any finding that the asserted governmental interest outweighs the asserted individual interests.*

At least two additional, and perhaps more fundamental, flaws affect the court of appeals' conception and use of the role of the Government as employer. First, in postulating a public employer invested with wide latitude and discretion in the management of its own internal affairs, and more particularly

personnel matters, the Fifth Circuit apparently overlooks the fact that, as such employer—as an apparatus—, the Government itself is subject to the Constitution. "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers." *Savings and Loan Ass'n* v. *Topeka*, 87 U.S. (20 Wall.) 455, 461 (1875). No entity or person has discretion to violate the Constitution. *Cf. Owen* v. *City of Independence*, 445 U.S. 622, 649 (1980) (municipality). The Bill of Rights monitors the activities of federal functionaries no less than those of state officials. *Butz* v. *Economou*, 438 U.S. 478, 504 (1978). "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity." *United States* v. *Lee*, 106 U.S. 196, 220 (1882). Thus it is that, under a rule of law, the interest of the Government, as an employer or otherwise, is to be weighed in the balance when that interest conflicts with one or more interests asserted either by an individual or by a group. *See Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), and the many cases in its train.

2. *Congress has not done any preemptive balancing of the competing interests involved in this case.*

In this case, Bush asserts several interests. Of primary concern at this juncture is his assertion of an interest in a remedy accorded the citizenry at large for constitutional violations by federal functionaries acting under color of law. Without itself balancing that interest against the interest of the Government as employer, the Fifth Circuit suggests that Congress already has balanced those interests. (647 F.2d at 576—577; Pet. App. A at a-8—a-9, a-9—a-10.) The Fifth Circuit finds such Congressional balancing-of-interests in a series of statutes all but one of which antedate *Bivens*.[6] The one post-*Bivens* statute cited by the

[6] Congress passed the Pendleton Act in 1883. ch. 27, 22 Stat. 403. It passed the Lloyd-LaFollette Act in 1912. ch. 389, 37 Stat. 555. Congress apparently passed the Back Pay Acts to which the Fifth Circuit

Fifth Circuit is the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1111).[7] The Fifth Circuit never explicitly says that Congress struck any balance as between the interest of civilian employees in access to court on *Bivens*-type claims and the interest of the Government as employer. Such omission is understandable. Congress has never made such a determination.

3. *Upon balancing of interests in this case, the individual interests and the implicated societal interests outweigh the interest of the Government as employer.*

This case calls for a balancing of interests, but by a court and not by Congress. Such need for judicial balancing-of-interests exists in this case even though Bush does not dispute the abstract accuracy of the general proposition that the Government may impose *some* restrictions upon the speech and conduct of its civilian employees which it could not impose upon the citizenry at large. *See, e. g., Pickering* v. *Board of Education, supra;* and *CSC* v. *National Ass'n of Let. Car.*, 413 U.S. 548 (1973). And *cf. McCarthy* v. *Philadelphia Civil Service Com'n*, 424 U.S. 645 (1976). While conceding that proposition

---

refers in 1948 and 1966. (*Compare Bush* v. *Lucas*, 647 F.2d at 576 [Pet. App. A at a-9] *with* 5 U.S.C. §5596 [1967]). Congress further amended the Back Pay Act in 1975, 1978 and 1980. (*Compare* 5 U.S.C.S. §5596 n. [1980]); but the Fifth Circuit does not include those amendments in the series of acts by which, according to the Fifth Circuit, "Congress has sought to achieve a proper balance between promoting governmental efficiency and protecting the rights of employees aggrieved by improper personnel action." (647 F.2d at 576; Pet. App. A at a-9.)

[7] In the Brief and Opposition to Bush's present position, counsel for Lucas concedes that Bush sued Lucas before Congress passed the Civil Service Reform Act of 1978. (Brief in Opposition, Nov. 1981, p. 8 n.5.) In his Brief and Opposition to Bush's prior petition for cert., he then Solicitor General not only made the same concessions, he observed that the 1978 Acts' amendments to the pre-existing administrative remedy "do not affect the merits of this case." (Brief for Respondent at 6 n.5, *Bush* v. *Lucas*, 446 U.S. 914 [1980].)

in the abstract, Bush asserts individual interests which, in the concrete circumstances of this case, outweigh the overly-generalized and undelimited governmental interest postulated by the court of appeals. Initially, Bush specifically avers that Lucas and the latter's co-conspirators effected Bush's demotion by way of punishment for having exercised specified First Amendment rights. (J.A. 7.) Such averments, supported in some circumstantial measure (see, e. g., J.A. 69, 73, 74, 80—81; Pet. App. E at e-12; and Pet. App. F at f-2—f-3) by the limited factual record which the trial court permitted to be developed (J.A. 37—38), implicate a constitutionally-protected individual interest not amenable to dilution by virtue of the mere existence of the postulated employment relationship. *See, e. g., Perry* v. *Sinderman,* 408 U.S. 593 (1972); *Pickering* v. *Board of Education, supra; Bernasconi* v. *Tempe Elementary School Dist. No. 3,* 548 F.2d 857 (9th Cir. 1977), *cert. denied,* 434 U.S. 825 (1978); *Pred* v. *Board of Instruction of Dade County, Fla.,* 415 F.2d 851 (5th Cir. 1969); and *Berry* v. *Macon County Board of Education,* 380 F. Supp. 1244 (M.D. Ala. 1971). In an effort fully to vindicate his primary individual interest in freedom from retaliatory demotion for exercising his First Amendment rights, Bush asserts an individual interest in being accorded a *Bivens*-type remedy.

Bush contends that judicial interdiction of a *Bivens*-type suit can not be justified merely upon the basis of a plaintiff's status as a civilian employee of the federal government. Bush contends that if such denial of access to courts for the determination of constitutional questions (*see Procunier* v. *Martinez,* 416 U.S. 396 [1974]; *Cruz* v. *Beto,* 405 U.S. 319 [1972]; and *Silver* v. *Cormier,* 529 F.2d 161 [10th Cir. 1976]; *cf. Califano* v. *Sanders,* 430 U.S. 99, 109—110 [1977]) can be justified at all, such justification may be found only upon a showing, by the Government, that: (a) there is an identifiable, and identified, governmental interest of such paramount importance, in our scale of societal values, that such governmental interest, unaugmented by any other considerations, outweighs the interest of individual

civilian employees in having *Bivens*-type remedies available for the full vindication of those employees' First Amendment rights; (b) that there is no way of adjusting and accommodating the two competing interests, so that they may co-exist without conflict and impairment; (c) that subordination of the individual interest to the paramount governmental interest is vital to the preservation or furtherance of the latter; (d) that the gain to the paramount governmental interest outweighs the loss inflicted upon the subordinated individual interest; and (e) that the means adopted in diminishing the individual interest be so drawn as to avoid unnecessary abridgment of that interest.

Those, in paraphrase, are the requirements which repeated pronouncements by this Court or different members thereof impose with respect to any burdening of the exercise of First Amendment rights by individual persons—governmental employees included. *Elrod* v. *Burns*, 427 U.S. 347, 362—363 (1976) (plurality opinion); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 259—260 (1977) (Powell, J., concurring, with Burger, C. J., and Blackmun, J., joining in such concurrence); and *cf. Keyishian* v. *Board of Regents of New York*, 358 U.S. 589, 602 (1967).

When tested by those standards, "the Government employer-employee relationship present in this case ..." (*Bush* v. *Lucas*, 647 F.2d 573, 577 [5th Cir. 1981]; Pet. App. A at a-12) hardly seems a legitimate basis for denying Bush a *Bivens*-type remedy. And we think it proper to test the suggested "special factor" by those standards because, as espoused by the Fifth Circuit, that "special factor" clearly would burden the exercise of a fundamental First Amendment right: in addition to penalizing a particular plaintiff, it would deter other prospective plaintiffs in seeking to vindicate to the fullest their First Amendment rights.

B. *Conjectural considerations of administrative convenience do not outweigh constitutional values.*

The court of appeals' use of the employer-employee relationship as a per se disqualification of Bush as a *Bivens*-type plain-

tiff is not ameliorated, in our judgment, by the apprehensions and conjectures voiced by that court (*Bush* v. *Lucas*, 647 F.2d 573, 577 [5th Cir. 1981]; Pet. App. A at a-10—a-11) with respect to the possible consequences, first in terms of administrative inconvenience and ultimately as a "disincentive to Congress" (*id.*), of according a *Bivens*-type remedy to civilian employees of the federal government. In view not only of the differences in the types of relief available under administrative review of adverse personnel actions *qua* personnel actions and under *Bivens* but also of the differences in the parties involved, not to mention the relative prospects of recovery, it is quite difficult to envision any massive "bypass[ing] [of] the statutory and administrative remedies in order to seek judicial relief...." (647 F.2d at 577; Pet. App. A at a-10.) Certainly, no empirical data on such an exodus appear anywhere in the memos, opinions and briefs served to date in this action. Moreover, as we have noted (*ante*, pp. 9-10, 12), Bush did exhaust his administrative remedies. Finally, even under the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1111), administrative remedies do not effectively fulfill the deterrent function that *Bivens* is capable of fulfilling.

In short, the Fifth Circuit's finding of one or more[4] "special factors counseling hesitation" (647 F.2d 573, 575, 577; Pet. App. A at a-6, a-12) appears, upon analysis, to be composed,

---

[4] We say "one or more" advisedly; for, as we have noted (*ante*, p. 15; and see Petition for Certiorari, 21 and n.6), the Fifth Circuit may be holding the pre-emption question in reserve. Moreover, one of the federal judges who has cited the Fifth Circuit's decision on remand in *Bush* v. *Lucas* has remarked that

> In denying ... [Bush] a right of action under the Constitution, the ... [Fifth Circuit] disavowed reliance on the "alternative remedy" prong of the *Carlson* test. Its analysis of the "special factors" prong, however, turned largely on the availability of a comprehensive remedial scheme reflecting an effort by Congress to "achieve a proper balance between promoting governmental efficiency and protecting the rights of employees aggrieved by improper personnel action .... Although the ... [Fifth Circuit]

like Lucas' antecedent "demonstration,"[9] of unequal parts of premature *per se-ism*, a priori assumptions and invocation of considerations of administrative convenience in a constitutional context. We submit that such a pastiche does not disclose any basis for denying Bush a *Bivens*-type remedy to avenge Lucas' alleged impairment of fundamental First Amendment rights.

Other lower federal courts have accorded a mixed reception to the Fifth Circuit's decision on remand in this case.[10] Petitions for certiorari in one or more of those other cases may now be pending before this Court.

---

ultimately incorporated this analysis under a "special factors" heading, it appears that *Lucas* [sic] would have been governed by *Davis* v. *Passman* but for the presence of an alternative remedial scheme.

Jaffee v. *United States*, 663 F.2d 1226, 1244—1245 (3d Cir. 1981) (en banc) (Adams, Cir. J., concurring in part and dissenting in part).

Finally, the Fifth Circuit itself initially mentioned its finding "special factors" (647 F.2d at 575, Pet. App. A at a-6) and did not singularize the term until the final paragraph of text of its decision on remand.

[9] Since Lucas served and filed his alternative motion to dismiss or for summary judgment (J.A. 12—22) without answering; since, apart from the general ground of failure to state a claim, etc., the motion rested upon the doctrine of absolute immunity (J.A. 12, 13—22 *passim*, 40—81 *passim*, 87—94 *passim;* since *Butz* v. *Economou*, *supra*, and *Harlow* v. *Fitzgerald*, *supra*, clearly appear to have limited officials with Lucas' functional responsibilities and level to qualified immunity only; and since *Harlow* has categorized such qualified immunity as an affirmative defense, to be pleaded by the defendant who relies thereon, it would seem to follow that Lucas' "demonstration" of "special factors" must be viewed as consisting only of his Supplemental Brief on remand to the Fifth Circuit and, further, as going only to the question of the sufficiency of Count Four of the complaint (J.A. 4—7).

[10] Published decisions of other courts citing the decision on remand in this case include, among perhaps others by now: *Jaffe* v. *United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc); *Purtill* v. *Harris*, 658 F.2d 134 (3d Cir. 1981), *cert. possibly pending; Sonntag* v. *Dooley* (7th Cir. 1981), *reh'g denied*, 14 Sep. 1981 (mem.); *Francisco* v.

II. Administrative Relief With Respect To An Adverse Personnel Action Does Not Pre-Empt A *Bivens*-Type Suit By The Victim Of An Unconstitutional Retaliatory Demotion.

A. *Congress has never said either: (1) that it intended such administrative relief as a substitute for a Bivens-type suit; or (2) that it viewed such administrative relief as being equally effective as a Bivens-type suit.*

In order for an alternative statutory remedy to preclude a *Bivens*-type action, the statutory remedy must be "equally effective in the view of Congress." *Bivens*, 403 U.S. at 397 (1971); *and see Davis*, 442 U.S. at 248 (1979), and *Carlson*, 446 U.S. at 19 (1980). At a purely verbal or strictly literal level, Lucas can not point, we believe, to any "*explicit* congressional declaration that persons injured by federal officers' violations of the ... [First] Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress." *See Carlson*, 446 U.S. at 19 (emphasis added).

B. *The administrative remedies afforded Bush were not equally as effective, either in terms of compensation or in terms of deterrence, as a Bivens-type suit may be.*

Regarding the matter, however, as not one to be resolved upon merely linguistic considerations, by the choice *vel non* of

---

Schmidt, 532 F. Supp. 850 (E.D. Wis. 1982); and *Carroll* v. *United States*, 522 F. Supp. 458 (N.D. Tex. 1981). Bush personally regards an interlocutory decision in *McAnaw* v. *Custis*, No. 81-4137, (D. Kan. 15 Jan. 1982) which has not been published in full text, although it has been summarized at Gov't Empl. Rel. Report 949:8, Feb. 8, 1982, as being sufficiently noteworthy as to justify his venturing to include a copy of the MS opinion as Appendix B to this brief. He similarly reproduces a counterpart of the order denying rehearing in *Sonntag* v. *Dooley*, No. 80-2435 (8th Cir. 14 Sept. 1981) as Appendix A to this brief.

"the magic words,"[11] or by the mere employment of "a formalistic procedural approach,"[12] we still say that, in this case, "the implied remedy[13] is plainly appropriate under any measure of discretion."[14] Conceding that Bush did receive back pay and reinstatement under the CSC Regulations then in force, we say that such administrative remedies, *received at the hands of the Government*, should not preclude Bush from maintaining a *Bivens*-type action against Lucas, the *individual natural person* who allegedly conspired with others to procure Bush's demotion. Such administrative relief as Bush may have received from the Government should not preclude his pursuit of Lucas in a *Bivens*-type suit because:

(a) The administrative remedies do not fully compensate Bush.

[1] Quite apart from the more or less dignitary aspects of his claim, and over and above his administratively redressed loss of pay, etc., Bush incurred substantial legal fees, used a number of hours of leave-time and necessarily made certain incidental outlays in seeking, and eventually obtaining, reinstatement and

---

[11] *Carlson* v. *Green*, 446 U.S. 14, 31 (Burger, C. J., dissenting.)

[12] *Id.*, at 31 (Rehnquist, J., dissenting.)

[13] —if that is what a *Bivens*-type remedy really is, rather than simply a timely evocation, in appropriate circumstances (albeit in substantial measure by grace of Congress in enacting the general federal-question statute) of interstitial doctrine that all along has lain latent, or at least mostly latent, either in the first eight amendments to the Constitution or in the antecedent common law.

[14] *Carlson* v. *Green*, 446 U.S. 14, 28 (Powell, J., concurring.)

restoration in grade and pay.[15] As of the time that the Civil Service Commission[16] directed Bush's reinstatement, with backpay, the CSC took the position that "corrective action" did not include reimbursement of legal fees and related expenses incurred by an employee in successfully seeking administrative relief. *Cf.*, albeit in the context of a discussion of review of allegedly discriminatory employment practices, Goodman, *Handbook on Public Personnel Law* 177, 212 (1978). There was judicial authority to support such position. *See, e.g., Fitzgerald* v. *United States Civil Service Commission,* 554 F.2d 1186 (D.C. Cir. 1977), construing § 14 of the Veterans' Preference Act of 1944 as amended (5 U.S.C. § 7701). Since Bush's ultimately successful appeal to the CSC's Appeals Review Board was not, and temporally could not have been, to the Merit Systems Protection Board, the attorneys' fee provisions[17] of the 1978 amendments to the Veterans' Preference Act were not, and still are not, available to Bush. *Payne* v. *Panama Canal Co.,* 607 F.2d 155, 164 (5th Cir. 1979). Nor do cognate amendments, effected at the same time, of the Back Pay Act aid Bush: while both

---

[15] Since this case has not yet advanced to the proof-taking stage, the record necessarily does not reflect all of Bush's claimed economic losses. The principal categories of those losses are delineated, however, in certain *parts* of the penultimate paragraph of Bush's affidavit (J.A. 36) accompanying his interim response to Lucas' motion for summary judgment. Although the leave-time referred to in the *first two* sentences of that paragraph at J.A. 36 was time which went into the preparation of an interim response to Lucas' motion in this case, it appears that more than 100 hours of the leave-time referred to in the *third and following* sentences of that paragraph went into Bush's efforts, ultimately successful, to obtain administrative relief. That relief helped; it did not make Bush whole.

[16] As the body was then called and which former entity we call "the CSC" at various points in this brief.

[17] § 205 (g) (1), Pub. L. 95-454, 92 Stat. 1139.

grossly unfair, in the general sense of the term, and downright wrongful, the personnel action, *qua* personnel action, of which Bush complained in the CSC proceedings did not fall within the definitions of "unfair labor practices" as respectively set forth or referred to in the attorney-fee-award-triggering subsections of 5 U.S.C. §§ 7716 and 7701, as amended by the Civil Service Reform Act of 1978. *Payne* v. *Panama Canal Co., supra,* at 164.

[2] In an analogous common law action for malicious initiation of administrative proceedings (*Melvin* v. *Pence,* 130 F.2d 423, 143 A.L.R. 149 [D.C. Cir. 1942], *aff'g* 38 F. Supp. 759 [D.D.C. 1941]; Restatement of Torts, §§ 680, 681), Bush clearly would be entitled, upon proper proof, to recover not only for such economic losses as those mentioned in the immediately preceding subparagraph of this brief but also upon the dignitary elements of his claim. *Compare Bergeron* v. *Goldman,* 64 F.2d 917 (5th Cir. 1933), *with, e.g., Killebrew* v. *Carlisle,* 97 Ala. 535, 12 So. 167 (1893), *with United States Fidelity & Guaranty Co.* v. *Miller,* 218 Ala. 158, 117 So. 668 (1928), *and with* Restatement of Torts, § 681. And *see, also, Hawkins* v. *Collins,* 5 Ala. App. 522, 59 So. 694 (1912). Even in combination with restoration in grade and rank, an administrative declaration that his demotion was unconstitutional hardly compensates Bush for three years of degradation, embarrassment and anxiety.

[3] If Bush were suing a *state* official for "the deprivation of any rights, privileges, or immunities secured by the Constitution...." (42 U.S.C. § 1983), Bush could recover upon such of the dignitary elements of his claim as he proved. *Cf. Baskin* v. *Parker,* 602 F.2d 1205 (5th Cir. 1979); *and see* C. Antieau, 1 *Federal Civil Rights Acts* § 210 (2d ed. 1980) and cases there cited. There is no corresponding feature in the administrative relief provided Bush, or which he could have obtained.

(b) On his *Bivens*-type claim, Bush might recover punitive damages. *See* the Majority Opinion in *Carlson*, 446 U.S. 14, 21-22 (1980); *see, also,* the remarks of Mr. Justice Powell, as joined in by Mr. Justice Stewart, in course of explicating the concurring Justices' conclusion, in *Carlson*, that "The Federal Tort Claims Act... simply is not an adequate remedy." *Id.* at 28 and n.1; *but see, contra,* the remarks of Mr. Justice Rehnquist in dissent, *id.*, at 47. The administrative analogues to which the reaffirmed (J.A. 3) panel opinion (598 F.2d at 961) would remit Bush do not include any feature comparable to punitive damages.

(c) Although this record apparently does not disclose a jury demand on Bush's part, there is still time for him to demand a jury for the trial of his *Bivens*-type claim.[18] Lucas has yet to serve a responsive pleading in this case. Bush will have not less than ten days from and after date of service of such pleading in which to demand trial by jury. See Rule 38(b), Fed. R. Civ. P. Jury trial was not, and is not, available under the administrative remedies to which the panel opinion of 12 July 1979 (598 F.2d 958) would remit Bush. As to the significance, for present purposes, of the availability of jury trial in a *Bivens*-type suit, *see* both the Majority Opinion (446 U.S. 14, 22-23) and the observations of Mr. Justice Powell in the Concurring Opinion (*Id.*, at 28 and n.1) in *Carlson*.

(d) Bush availed himself of administrative remedies largely shaped by regulations adopted under broad and imprecise delegations. *See* §§ 1301, 1302 (b), 3302, 5596 and 7701 of Title 5 of the United States Code, as those sections stood prior to the

---

[18] Assuming that such demand was not endorsed on the complaint as originally filed in state court. (The copy of the complaint in this record [R. 6—9] was an exhibit to Lucas' petition for removal of the action from state to federal court [J.A. 8-9].)

Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1111—1227), together with Civil Service Rule V, as set out in Subchapter A of Chapter 1 of the Civil Service Regulations (5 C.F.R.) as the same stood prior to changes in the wake of the just-mentioned Act of 1978; and *see*, further, 5 C.F.R. §§ 550.801—550.804, 752.101—752.402 and 772.101—772.404 (1975), also as *those* regulatory sections stood prior to the just-mentioned changes. In the aggregate, the mentioned regulations and the underlying delegations did not disclose, we submit, any Congressional intent to pre-empt a judicial remedy for federal functionaries' violations of federal employees' constitutional rights albeit such violations occurred in the context of an adverse personnel action. There are too many gaps in the remedial pattern for it to be regarded as *either* sufficiently comprehensive *or* sufficiently focalized to preclude a *Bivens*-type remedy for such violations. In that respect, as well as perhaps others, the case at bar is far different from *Brown* v. *GSA*, 425 U.S. 820 (1976), where this Court admittedly did hold "that § 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of *discrimination* in federal employment" (*Id.* at 835; emphasis added.)

(e) In evaluating Bush's administrative remedies, one must remember that those remedies derive their very existence from waivers of sovereign immunity, in the underlying statutes. Those statutes afford remedies against the United States; they do not afford remedies against individual federal functionaries.[19] As waivers of sovereign immunity, such statutes uniformly—or, at least, regularly—receive strict construction by the courts. *See, e.g., United States* v. *Testan*, 424 U.S. 392 (1976); *Payne* v. *Panama Canal Co.*, 607 F.2d 155 (5th Cir.

---

[19] Indeed, to the extent that federal functionaries are able to induce courts to hold that such remedies are exclusive, the remedies actually tend to immunize real wrongdoers and, pro tanto, to penalize taxpayers by distributing the costs of reparation over the entire community of taxpayers.

1979); *Morris* v. *United States*, 595 F.2d 591 (Ct. Cl. 1979); and *Hurley* v. *United States*, 624 F.2d 93 (10th Cir. 1980). Thus, in their presently relevant parts, the Back Pay Act and the Veterans' Preference Act, both as amended, are not to be extended beyond personnel actions, *qua* personnel actions. They do not, they can not, provide more than a *partial* remedy for the wrong done Bush. There is no evidence that, in enacting and amending those statutes, Congress meant for federal employees in Bush's position to receive half a loaf. Had Congress meant for the remedies which it made available under those statutes to be exclusive, it would have been very easy for Congress to say so. It has not said so.

(f) Finally, the postulated alternative remedy is wholly deficient as a *deterrent*. Just as the *Carlson* majority concluded that "[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States..." (446 U.S. at 21), so also, we submit, should this Court conclude that Bush's *Bivens*-type suit is more effective as a deterrent than the administrative remedies to which the Fifth Circuit would remit Bush.

CONCLUSION

The judgment of the court of appeals should be reversed and this case remanded to that court, with directions further to remand the case to the trial court for trial after the allowance of time for full discovery.

Respectfully submitted,

WILLIAM HARVEY ELROD, JR.,
205 Holly Street, N.E.,
Decatur, Alabama 35602
Tel. No. 205-355-2644
Attorney for Petitioner

14 September 1982.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 80-2435

September 14, 1981

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

Mary Ellen Sonntag,
Plaintiff-Appellant,

vs.

George E. Dooley; Joseph A. Genna; and Roy Carlton,
Defendants-Appellees

Appeal from the United States District Court
For the Northern District of Illinois,
Eastern Division.

No. 79-C-2876
Judge Nicholas J. Bua

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 81-4137

Mary P. McAnaw, M.D.,
Plaintiff,

vs.

Donald L. Custis, et al.,
Defendants.

MEMORANDUM AND ORDER

Plaintiff, Dr. Mary P. McAnaw, is a physician employed by the Veterans Administration Medical Center at Leavenworth, Kansas. She is the Chief of Surgical Services at that hospital. Plaintiff has brought this action against four defendants: Donald L. Custis, Administrator of the Veterans Administration; Dr. D. Earl Brown, Jr., Deputy Assistant Chief Medical Director for Professional Services of the Veterans Administration; Dr. K. Paul Poulose, Chief of Staff of the Veterans Administration Medical Center at Leavenworth, Kansas; and Margaret C. Michelson; Director of the Veterans Administration Medical Center at Leavenworth, Kansas. Defendants Custis and Brown are sued only in their official capacities. Defendants Poulose and Michelson are sued in both their official and individual capacities.

Plaintiff charges defendants with taking various administrative actions against her in retaliation for the exercise of her First Amendment rights. Plaintiff further charges that the retaliatory measures have also impaired her right to travel, her right of association, and her due process and equal protection

rights. Certain pendent state law claims are also made. Plaintiff has requested relief in the form of monetary damages and injunctive relief. Plaintiff's request for a preliminary injunction against holding an administrative disciplinary proceeding under 38 U.S.C. § 4110 and taking other retaliatory actions has been denied previously by this court.

Defendants have filed a summary judgment motion. This motion is mainly concerned with the propriety of plaintiff's motion for a preliminary injunction. Since plaintiff was not granted the injunction, we need only concern ourselves with defendants' contention that this action lacks a proper jurisdictional basis. Defendants argue that this is an employment discrimination case which must be brought under 42 U.S.C. § 2000e-16. This section prohibits personnel actions taken by executive agencies to discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-16(a).

Plaintiff argues that this is a *Bivens* action for which jurisdiction is appropriate under 28 U.S.C. § 1331. Plaintiff also claims jurisdiction under 28 U.S.C. § 1343, 42 U.S.C. §§ 1983 and 1985, and certain provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

We believe the most important question raised by the summary judgment motion is whether plaintiff has stated a cause of action. If plaintiff may bring a *Bivens* action under the circumstances alleged in this case, then jurisdiction is proper under 28 U.S.C. § 1331. *Kite* v. *Kelley*, 546 F.2d 334, 337 (10th Cir. 1976). Therefore, defendant's summary judgment motion might better be construed as a motion to dismiss for failure to state a claim. For the reasons stated below, we believe that plaintiff has properly alleged a *Bivens* action which may not be dismissed at this early stage of litigation. We also believe this conclusion renders unnecessary a further decision on the validity of the other jurisdictional bases asserted by plaintiff.

Of course, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) has engendered considerable judicial and scholastic commentary. With *Davis* v. *Passman*, 442 U.S. 228 (1979) and *Carlson* v. *Green*, 446 U.S. 14 (1980), the Supreme Court has confirmed the vitality of *Bivens* for constitutional torts arising from the eighth and fifth amendments and supplied some guidance for the employment of the *Bivens* remedy. Without engaging in an extended discussion of *Bivens* and its progeny, we believe that the propriety of a *Bivens* claim may be determined by answering four questions: 1) whether a constitutional tort has been alleged; 2) whether Congress has provided an equally effective alternative remedy which it has declared to be a substitute for recovery directly under the Constitution; 3) whether "special factors counseling hesitation" exist giving the court reason to deny judicial relief; and 4) whether official immunity on the part of an official bars judicial relief.[1] See Note, *The Bivens Doctrine Ten Years Down the Road*, 47 BROOKLYN L.REV. 125 (1980).

---

[1] One might argue that *Bivens'* application to first amendment violations must also be determined. This is relatively uncontroversial though. With *Davis* v. *Passman*, *supra*, and *Carlson* v. *Green*, *supra*, it is clear that *Bivens* remedies extend beyond fourth amendment violations. Moreover, several lower courts have recognized the potential for *Bivens* actions in first amendment cases. E.g., *Milhouse* v. *Carlson*, 652 F.2d 371 (3d Cir. 1981); *Yiamouyiannis* v. *Chemical Abstracts Service*, 578 F.2d 164 (6th Cir. 1978) *cert. denied*, 439 U.S. 983 (1978); *Dellums* v. *Powell*, 566 F.2d 167 (D.C. Cir. 1977) *cert. denied*, 438 U.S. 916 (1978); *Paton* v. *La Prade*, 524 F.2d 862 (3d Cir. 1975); *Jihaad* v. *Carlson*, 410 F.Supp. 1132 (E.D. Mich. 1976); *Berlin Democratic Club* v. *Rumsfeld*, 410 F.Supp. 144 (D.D.C. 1976); *Butler* v. *United States*, 365 F.Supp. 1035 (E.D.N.Y. 1973); see also, *Kite* v. *Kelly*, *supra*; *Tatum* v. *Morton*, 562 F.2d 1279 (D.C. Cir. 1977); *Neely* v. *Blumenth[illegible]* 458 F.Supp. 945 (D.D.C. 1978); *Sparrow* v. *Goodman*, 361 F.Supp. 566 (W.D.N.C. 1973) *aff'd sub nom.*, *Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974).

HAS A CONSTITUTIONAL TORT BEEN ALLEGED?

We are obliged at this point in the litigation to assume the truth of the allegations made in the complaint. The complaint alleges that defendants retaliated against plaintiff for her comments concerning the treatment of VA hospital patients, the testing of experimental drugs, the relationship between private drug manufacturers and V.A. physicians, and other matters of hospital operation. The alleged retaliatory action impaired plaintiff's right of association. Of course, the first amendment protects the right of free expression and association. *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Public employees do not forfeit these rights by virtue of their employment. *Elrod* v. *Burns*, 427 U.S. 347 (1976). Job actions taken in relatiation for public expression or private comments on matters of public concern constitute constitutional torts when the actions taken are not necessitated by legitimate business or administrative interests. Cf., *DeLuca* v. *Sullivan*, 450 F.Supp. 736 (D. Mass. 1977) (§ 1983 action may be brought against defendants who allegedly failed to promote plaintiffs because of their criticism of union activity and political interference with the police department). After examining the complaint in this case, we believe it is clear that a constitutional tort has been alleged. Of course, defendants may assert at a later time that plaintiff's first amendment rights are circumscribed by defendants' legitimate interest in orderly administration.

HAS CONGRESS PROVIDED AN EQUALLY EFFECTIVE ALTERNATIVE REMEDY WHICH IT HAS DECLARED TO BE THE EXCLUSIVE RELIEF AVAILABLE TO THE PLAINTIFF?

It has not been demonstrated that Congress has afforded plaintiff an effective alternative remedy for plaintiff. Title 42 Section 2000e-16 controls discrimination on account of race, color, religion, sex, and national origin. It does not afford a

remedy for actions taken to penalize the exercise of free speech. Defendants contend that this is a gender discrimination action in disguise because plaintiff has filed an administrative complaint charging sex discrimination based on the same affidavit plaintiff has filed in this case. The detailed complaint and accompanying affidavit indicate that plaintiff is making a serious first amendment claim in this case. We are unwilling to require plaintiff to exhaust her administrative remedies for her sex discrimination claim before bringing her first amendment claim to court, merely because the two claims arise from related events.

Defendants also claim that plaintiff has an effective remedy through the 38 U.S.C. § 4110 disciplinary proceeding. The existence of this remedy was one factor which persuaded the court to deny injunctive relief in this case. Plaintiff's fear of a forced transfer was a chief concern in her bid for injunctive relief. But, the court felt that a transfer could be challenged, and should be challenged through the procedures of 38 U.S.C. § 4110 before court action was sought. We do not perceive § 4110, however, as an adequate mode for redressing plaintiff for actions which have already been taken against her in retaliation for the exercise of first amendment rights—particularly when these actions have not been taken by a disciplinary board and do not involve a dismissal or demotion.

The cases relied upon by defendants in oral argument, *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981) and *Bishop* v. *Tice*, 622 F.2d 349 (8th Cir. 1980), indicate that civil service remedies foreclosed a *Bivens* action in cases where federal employees have been demoted or constructively discharged for wrongful reasons. In *Bush* v. *Lucas*, *supra*, the court did not consider the civil service remedy "an effective alternative remedy." Instead, the court considered it a "special factor counseling hesitation." The court believed that inferring a *Bivens* remedy in spite of the civil service remedy

> would tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established. Ultimately it would provide a disincentive for Congress to continue improving the mechanisms by which an aggrieved employee can protect his rights.

647 F.2d at 577. In *Bishop* v. *Tice, supra,* although the court characterized a *Bivens* action as a "parallel" remedy, it also concluded that the civil service procedures

> constitute[d] a "special factor counseling hesitation" in the creation of a constitutionally based remedy for a wrongful dismissal; we are persuaded it would therefore be unwise to infer a cause of action for damages directly from the Fifth Amendment.

622 F.2d at 357. Thus, with regard to the question of whether an equally effective alternative remedy exists for plaintiff, *Bush* and *Bishop* are distinguishable on two grounds: 1) the cases concerned demotion and dismissal—actions for which civil service remedies may exist—but actions which are not alleged in this case; and 2) *Bush* and *Bishop* declared the civil service procedures to be "special factors counseling hestiation" not equally effective remedies. In sum, we conclude that an equally effective alternative remedy has not been demonstrated.

DO "SPECIAL FACTORS COUNSELING HESTITATION" EXIST?

We believe that a court should hestiate before involving itself in employer-employee relationship particularly when machinery has already been established for the resolution of problems aris-

ing from such relationships. This concern, however, shall not prevent us from sanctioning the implication of a *Bivens* action in this case for two reasons. First, we must acknowledge that courts are constantly forced to examine employer-employee relationships—sometimes under circumstances analogous to those alleged here. Indeed, by implying a *Bivens* action under these circumstances, we are merely allowing an action to be taken against federal officials for conduct which is actionable under 42 U.S.C. § 1983 against state officials. Thus, the court is not operating in uncharted waters or interfering in an area traditionally exempt from judicial supervision. The second reason why interference with the employer-employee relationship does not counsel us to deny a *Bivens* remedy in this case, is that the administrative machinery so far brought to our attention does not appear adapted or adaptable to the first amendment claims plaintiff is pursuing. Thus, we do not share the fears expressed in *Bush* v. *Lucas, supra* and *Bishop* v. *Tice, supra* that a *Bivens* remedy will promote the circumvention or subsumption of the administrative framework.

We do not know whether the implication of a *Bivens* action under these circumstances will prove to be a disincentive to Congressional action. It is easy to see, however, that if this theoried disincentive were a roadblock to asserting a *Bivens* claim, no *Bivens* action would ever be allowed. A *Bivens* remedy is a substitute for the absence of legislative relief for constitutional torts. The failure of Congress to act is a reason for implying a *Bivens* action, but not a reason against implying a *Bivens* action. Of course, the Supreme Court made it clear in *Carlson* v. *Green, supra,* that it would respect an explicit declaration by Congress that an alternative remedy has been fashioned as a substitute for recovery directly under the Constitution. 446 U.S. at 18-19. No such declaration has been shown here.

In sum, no special factor counseling hesitation has been demonstrated which convinces us that a *Bivens* action should not be inferred in this case.

DOES OFFICIAL IMMUNITY BAR JUDICIAL RELIEF?

Defendants have not alleged that they are immune from the relief prayed for by plaintiff. Quite probably at least some of the defendants in this case are entitled to a qualified immunity from liability for constitutional torts. *See Butz* v. *Economou*, 438 U.S. 478 (1978). The extent to which defendants' qualified or complete immunity protects them from liability is a matter which cannot be decided at this time.

CONCLUSION

In conclusion, after an examination of the complaint and the factors which must be considered before permitting a *Bivens* action, we find that plaintiff has successfully alleged a *Bivens* action. Therefore, jurisdiction of this case is appropriate under 28 U.S.C. § 1331. Defendants' motion for summary judgment shall be denied.

Dated this 15th day of January, 1982, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 81-4137

Mary P. McAnaw, M.D.,
Plaintiff,

vs.

Donald L. Custis, et al.,
Defendants.

ORDER

This order is to clarify and correct a mistatement made in the memorandum opinion filed January 15, 1982. Therein we stated that defendants had not pleaded immunity as a defense in this case. In fact, defendants do include a claim of immunity in their answer. This correction has no bearing upon the ruling made in the memorandum opinion. The court, however, apologizes for the inaccuracy.

Dated this 15th day of January, 1982, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-469

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH, PETITIONER

v.

WILLIAM R. LUCAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

BARBARA L. HERWIG
WENDY M. KEATS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a federal employee who claims that he was demoted in violation of the First Amendment, and who is reinstated and awarded full back pay after pursuing his civil service remedies, also has an implied constitutional cause of action for damages against the official who approved his demotion.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Summary of argument	7
Argument:	
A federal employee challenging a demotion who can obtain reinstatement and back pay through civil service remedies may not also seek damages, under an implied constitutional cause of action, from an official who approved the demotion	12
A. Introduction	12
B. The civil service remedies available to petitioner precluded an implied constitutional damages action	18
1. The differences between the civil service remedies and the implied damages remedy do not require that petitioner be allowed to bring a damages action	18
2. The complexity of the civil service remedies, and their frequent adjustment, reflect Congress's intent to occupy the field	26
3. When Congress established the civil service remedies, it assumed that courts would not play an active role in remedying federal employees' grievances	34
4. Creating a personal damages remedy in this context would thwart important congressional policies	37
C. Special factors require the court to hesitate before creating an implied damages remedy for federal employees	42

Argument—Continued Page

1. Federal employees challenging adverse personnel actions do not have a strong claim to judicial protection 42
2. Disputes concerning the federal employment relationship are properly addressed, in the first instance, in a specialized administrative agency, not a court 45

Conclusion 49

TABLE OF AUTHORITIES

Cases:

Abood v. *Detroit Board of Education*, 431 U.S. 209 34
Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227 24
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 47
Armstrong v. *United States*, 405 F.2d 1275, cert. denied, 395 U.S. 934 20
Arnett v. *Kennedy*, 416 U.S. 134 ..... 6, 17, 18, 28, 29, 38
Arrow Transportation Co. v. *Southern Ry.*, 372 U.S. 658 45
Avitzur v. *Davidson*, 549 F. Supp. 399 17
Bailey v. *Richardson*, 182 F.2d 46, aff'd by an equally divided court, 341 U.S. 918 36
Barr v. *Matteo*, 360 U.S. 564 4
Bell v. *Hood*, 327 U.S. 678 12
Bielec v. *United States*, 456 F.2d 690 20
Bishop v. *Tice*, 622 F.2d 349 ..... 17, 19, 25-26
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 ..... *passim*
Bollman, Ex parte, 8 U.S. (4 Cranch) 75 12
Branti v. *Finkel*, 445 U.S. 507 34
Broussard v. *United States Postal Service*, 674 F.2d 1103 17
Brown v. *General Services Administration*, 425 U.S. 820 ..... 8, 9, 16, 22, 27, 28, 36, 47

Cases—Continued — Page

Burnap v. *United States*, 252 U.S. 512 36
Butz v. *Economou*, 438 U.S. 478 ..... 20-21, 38, 39
Cafeteria Workers v. *McElroy*, 367 U.S. 886..... 18
Cale v. *City of Covington*, 586 F.2d 311 26
Cannon v. *University of Chicago*, 441 U.S. 677.... 35
Carlson v. *Green*, 446 U.S. 14 ..... *passim*
Carey v. *Piphus*, 453 U.S. 247 44
Cary v. *Curtis*, 44 U.S. (3 How.) 236 16
Chandler v. *Roudebush*, 425 U.S. 840 47
Charlton v. *United States*, 412 F.2d 390 20
City of Milwaukee v. *Illinois*, 451 U.S. 304..15, 16, 17, 24, 27, 28, 35
Dabney v. *Freeman*, 358 F.2d 533 20
Davis v. *Passman*, 442 U.S. 228 ..... *passim*
Dean v. *Gladney*, 621 F.2d 1331, cert. denied, 450 U.S. 983 25
Decatur v. *Pauling*, 39 U.S. (14 Pet.) 497 36
D'Oench, Duhme & Co. v. *Federal Deposit Insurance Corp.*, 315 U.S. 447 14
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 35
Egger v. *Phillips*, 669 F.2d 497 17
Ellis v. *Blum*, 643 F.2d 68 25
Erie R.R. v. *Tompkins*, 304 U.S. 64 16
Fitzgerald v. *United States Lines*, 374 U.S. 16.... 14
Florida Avocado Growers v. *Paul*, 373 U.S. 132.... 28
Givhan v. *Western Line Consolidated School District*, 439 U.S. 410 46
Gissen v. *Tackman*, 537 F.2d 784 22
Great American Federal Savings & Loan Association v. *Novotny*, 442 U.S. 366 47
Gregoire v. *Biddle*, 177 F.2d 579, cert. denied, 339 U.S. 949 25
Harlow v. *Fitzgerald*, No. 80-945 (June 24, 1982) 25, 39
Holden v. *Finch*, 446 F.2d 1311 46
Isbrandtsen Co. v. *Johnson*, 343 U.S. 779 ..... 35, 36
Jenkins v. *Macy*, 237 F. Supp. 60, aff'd, 357 F.2d 62 20
Johnson v. *Railway Express Agency*, 421 U.S. 454 47

Cases—Continued

	Page
Jones v. *City of Memphis*, 586 F.2d 622, cert. denied, 440 U.S. 914	25
Kansas v. *Colorado*, 206 U.S. 46	14
Keim v. *United States*, 177 U.S. 290	36
Kremer v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982)	48
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682	15
Lehman v. *Nakshian*, 453 U.S. 156	23
Mahone v. *Waddle*, 564 F.2d 1018	26
Maine v. *Thiboutot*, 448 U.S. 1	27
McCardle, Ex parte, 74 U.S. (7 Wall.) 506	16
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792	47
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, No. 80-203 (May 3, 1982)	35
Middlesex County Sewerage Authority v. *National Sea Clammers Association*, 453 U.S. 1	27
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618	25, 35, 36, 40
Mohasco Corp. v. *Silver*, 447 U.S. 807	25
Molina v. *Richardson*, 578 F.2d 846, cert. denied, 439 U.S. 1048	25
Monell v. *Department of Social Services*, 436 U.S. 658	25
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246	13
Morton v. *Mancari*, 417 U.S. 535	35
Nadar v. *Allegheny Airlines, Inc.*, 426 U.S. 290	34
National Railroad Passenger Corp. v. *National Association of Railroad Passengers*, 414 U.S. 453	45
Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400	48
New Jersey v. *New York*, 283 U.S. 336	15
New York Gaslight Club, Inc. v. *Carey*, 447 U.S. 54	21
Nixon v. *Fitzgerald*, No. 79-1738 (June 24, 1982)	39
Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77	15, 25, 27
Owen v. *City Independence*, 445 U.S. 622	39
Parratt v. *Taylor*, 451 U.S. 527	23
Pennsylvania v. *Mimms*, 434 U.S. 106	43

Cases—Continued — Page

Pickering v. *Board of Education*, 391 U.S. 563 46
Purtill v. *Harris*, 658 F.2d 134, petition for cert. pending, No. 81-1010 ..... 17, 22
Sampson v. *Murray*, 415 U.S. 61 ..... 18, 28, 31, 36
Sheldon v. *Sill*, 49 U.S. (8 How.) 441 12
Sonntag v. *Dooley*, 650 F.2d 904 17
Tarpley v. *Greene*, 684 F.2d 1 ..... 23, 25
Texas & Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 34-35
Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 ..... 16, 24, 27, 28
Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 14
Toohey v. *Nitze*, 429 F.2d 1332, cert. denied, 400 U.S. 1022 20
Twiggs v. *Small Business Administration*, 541 F.2d 150 20
United States v. *Carolene Products Co.*, 304 U.S. 144 43
United States v. *Fisher*, 6 U.S. (2 Cranch) 358 16
United States v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 12
United States v. *Lee*, 106 U.S. 196 43
United States v. *Little Lake Misere Land Co.*, 412 U.S. 580 16
United States v. *Standard Oil Co.*, 332 U.S. 301 43
United States v. *Testan*, 424 U.S. 392 ..... 31, 36
United States v. *Utah Construction & Mining Co.*, 384 U.S. 399 48
United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 46
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 46
Universities Research Association, Inc. v. *Coutu*, 450 U.S. 754 27
Vigil v. *Post Office Department*, 406 F.2d 921 20
Wathen v. *United States*, 527 F.2d 1191 46
White v. *Berry*, 171 U.S. 366 36
Wren v. *Merit Systems Protection Board*, 681 F.2d 867 46
Yerger, Ex parte, 75 U.S. (8 Wall.) 85 16
Young v. *Hampton*, 568 F.2d 1253 20

Constitution, statutes and regulations: Page

United States Constitution:
Article III, Section 2 16
First Amendment 3, 4, 5, 9, 11, 18, 19, 30, 46
Fourth Amendment 12, 13, 43
Fifth Amendment 13
Eighth Amendment 14
Act of Aug. 24, 1912, ch. 389, Section 6, 37 Stat. 555 29
Back Pay Act of 1948 (Act of June 10, 1948, ch. 447, 62 Stat. 354) 31
Back Pay Act of 1966, 5 U.S.C. (& Supp. IV) 5596 .. 21
Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. IV) 2000e *et seq.*:
42 U.S.C. 2000e-2(a)(1) 43
42 U.S.C. 2000e-5(g) 23
42 U.S.C. 2000e-16 ..... 13, 22
42 U.S.C. 2000e-16(a) 13
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. V) 1101 *et seq.* 20
Section 907, 92 Stat. 1227 33
5 U.S.C. (Supp. V) 1205 32
5 U.S.C. (Supp. V) 1206 33
5 U.S.C. (Supp. V) 1206(c)(1)(A) 33
5 U.S.C. (Supp. V) 1206(c)(1)(B) 33
5 U.S.C. (Supp. V) 1206(g) 33
5 U.S.C. (Supp. V) 1207(b) 33
5 U.S.C. (Supp. V) 2302(b)(8)(A) 33
5 U.S.C. (Supp. V) 5401 et seq. 38
5 U.S.C. (Supp. V) 7513(a) 18
5 U.S.C. (Supp. V) 7701 32
5 U.S.C. (Supp. V) 7701(c) 32
5 U.S.C. (Supp. V) 7703 32
5 U.S.C. (Supp. V) 7703(c)(1) 33
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 32-33
Federal Tort Claims Act:
28 U.S.C. 1346(b) 14
28 U.S.C. 2671 *et seq.* 14

Constitution, statutes and regulations—Continued Page

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (& Supp. IV) 1251 *et seq.* 27
Labor-Management Relations Act, 29 U.S.C. 185 (a) 14
Lloyd-LaFollette Act, 5 U.S.C. 7501 ..... 18, 28, 29-30, 33
Pendleton Act of 1883 (Act of Jan. 16, 1883, ch. 27, 22 Stat. 403) 29
Section 1, 22 Stat. 403 29
Section 2, 22 Stat. 403-404 29
Veterans Preference Act of 1944 (Act of June 27, 1944, ch. 287, Section 14, 58 Stat. 391, 5 U.S.C. 7501, 7512 31
5 U.S.C. 706 3
28 U.S.C. 1331(a) 12
28 U.S.C. 2680(h) 35
42 U.S.C. (Supp. IV) 1983 ..... 25, 27
5 C.F.R. (1975):
Section 752.104(a) 18
Section 752.202(a) 19
Section 752.202(b) 19
Section 752.202(f) 2, 19
Section 752.203 ..... 3, 19
Section 772.101 19
Section 772.307 31
Section 772.307(c) 20
Section 772.310 ..... 4, 20

Miscellaneous: Page

P. Bator, P. Mishkin, D. Shapiro &. H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* (2d ed. 1973) 14
Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Leg. 1 (1979) 41
Chaturvedit, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 Nw. U.L. Rev. 287 (1968) 36
48 Cong. Rec. (1912):
p. 4513 30
p. 4653 30
p. 4738 30

Miscellaneous—Continued

	Page
p. 5201	30
p. 5207	30
p. 5223	30
p. 5635	30
p. 5637	30
p. 5638	30
p. 10673	30
p. 10675	30
p. 10730	30
p. 10732	30
p. 10795	30
p. 10799	30
p. 10803	30
111 Cong. Rec. 2476 (1965)	32
129 Cong. Rec. (daily ed. Aug. 11, 1978):	
p. H8463	39
p. H8473	38
Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532 (1972)	25
J. Ely, *Democracy and Distrust* (1980)	43
T. Emerson, *The System of Freedom of Expression* (1970)	46
Exec. Order No. 10988, 27 Fed. Reg. 551 (1962)	31
Exec. Order No. 11491, 34 Fed. Reg. 17605 (1969)	31
Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953)	16, 40
Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109 (1969)	15
H.R. Rep. No. 32, 89th Cong., 1st Sess. (1965)	32
H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. (1978)	33, 37, 39, 41
H.R. Rep. No. 1436, 80th Cong., 2d Sess. (1948)	31
H.R. Rep. No. 1826, 47th Cong., 2d Sess. (1882)	29, 37
Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 Cornell L. Rev. 178 (1972)	20
Katz, *The Jurisprudence of Remedies: Constitutional Legality And The Law Of Torts In Bell v. Hood*, 117 U. Pa. L. Rev. 1 (1968)	15

Miscellaneous—Continued Page

Landes & Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1 (1975) 25
Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 Va. L. Rev. 196 (1973) .. 21, 36
Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) 14
Note, *"Damages or Nothing"—The Efficacy of the Bivens-Type Remedy*, 64 Cornell L. Rev. 667 (1979) 35
Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 Colum. L. Rev. 719 (1966) 36
Sager, *The Supreme Court, 1980 Term-Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981) 23
Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281 38
S. Rep. No. 95-696, 95th Cong., 2d Sess. (1978) .. 33, 37, 38
S. Rep. No. 1062, 89th Cong., 2d Sess. (1966) 31-32
Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195 (1982) 37
Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394 (1982) 27, 45
R. Vaughn, *Principles of Civil Service Law* (1976) 29

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-469

WILLIAM C. BUSH, PETITIONER

v.

WILLIAM R. LUCAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. a-1 to a-12) is reported at 647 F.2d 573. The order of this Court vacating the initial judgment of the court of appeals and remanding the case for further consideration (Pet. App. b-1) is reported at 446 U.S. 914. The initial opinion of the court of appeals (Pet. App. c1-1 to c1-14) is reported at 598 F.2d 958. The opinion and order of the district court (Pet. App. d-1 to d-17), and the decisions of the Civil Service Commission (Pet. App. e-1 to g-3), are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1981. The petition for a writ of certiorari was filed on September 4, 1981, and was granted on June 28, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an aerospace engineer who has been employed for more than seven years by the National Aeronautics and Space Administration (NASA) at the Marshall Space Flight Center in Alabama. The Center is one of NASA's major facilities, employing 4500 persons (J.A. 18). Respondent is the Director of the Center, with responsibility for all of the Center's operations (J.A. 18-19). In May and June 1975, following major reorganizations at the Center, petitioner, in several newspaper and television interviews, stated that he had little meaningful work to do and that the position to which he had been reassigned was a "travesty." These statements were widely publicized (Pet. App. d-2 to d-3).

The Director of Science and Engineering at the Center, who is not a party to this case, investigated petitioner's allegations (J.A. 45) and ultimately initiated proceedings to have petitioner removed from his position (J.A. 15; Pet. App. e-15). His principal charge was that petitioner "on more than one occasion publicly ma[d]e intemperate remarks which were misleading and often false, evidencing a malicious attitude * * * and generating an environment of sensationalism * * *." The Director of Science and Engineering further asserted that petitioner's "conduct has undermined morale at the * * * Center and brought disharmony and disaffection among fellow employees" (Pet. App. f-2 to f-3, e-7; emphasis omitted).

Respondent was responsible for reviewing the proposed discharge. See 5 C.F.R. 752.202(f) (1975). After petitioner submitted written and oral replies to the charges against him, respondent dismissed some of the charges and determined not to remove petitioner from his position (Pet. App. e-14). Respondent did decide, however, that certain of the charges were justified and that petitioner should be demoted two grades, from GS-14 to GS-12 (*id.* at f-2, f-4). Petitioner was notified of this action in November 1975 (J.A. 15).

2. Civil Service Commission regulations entitled petitioner to appeal his demotion to the Commission, and petitioner did so (5 C.F.R. 752.203 (1975); Pet. App. c1-6). After a three-day trial-type hearing that was open to the press and the public (Pet. App. e-2), the Commission's Federal Employee Appeals Authority upheld NASA's action (*id.* at e-41 to e-42). The Appeals Authority found that "the evidence clearly shows that [petitioner's new assignment] was not false or worthless" (*id.* at e-26) and that petitioner's statements "were actually motivated by [his] desire to have his position abolished for the personal benefit of being able to take early retirement and enter law school" (*id.* at e-35). The Appeals Authority concluded that petitioner's public "statements were misleading; that they generated an environment of sensationalism demeaning to the government, the agency, and its personnel at [the Center,] and that they impeded government efficiency and economy and adversely affected public confidence in the government service" (*id.* at e-31). The Appeals Authority also specifically rejected petitioner's assertion that respondent was biased against him and did not fairly review the charges (*id.* at e-14).

The Appeals Authority then considered, and rejected, petitioner's claim that his demotion violated the First Amendment. The Appeals Authority acknowledged that the First Amendment protects a wide range of speech by public employees, but noted that petitioner made "unwarranted public remarks critical of his agency for reasons of self-interest" (Pet. App. e-39). The Appeals Authority accordingly ruled that petitioner's "public remarks exceeded the bounds of expression protected by the first amendment" (*id.* at e-38).

Petitioner could have, but did not, bring suit in federal district court (Pet. App. d-15 n.5) to challenge the Commission's decision as arbitrary and capricious, unsupported by substantial evidence, or otherwise unlawful (see 5 U.S.C. 706; page 20, *infra*). Instead, two years after the Appeals Authority's decision, petitioner successfully requested that the Civil Service Commission's Ap-

peals Review Board reopen the administrative proceeding. See 5 C.F.R. 772.310 (1975). The Appeals Review Board accepted the factual conclusions reached in the earlier proceeding, and it again rejected petitioner's claim that respondent was biased against him (Pet. App. f-10 to f-11, f-14), but it agreed to reexamine petitioner's First Amendment claim. The Appeals Review Board noted that petitioner had "admitted to a certain amount of exaggeration," that the Appeals Authority had found that petitioner was motivated by a desire for personal gain, and that petitioner had acted "precipitous[ly] * * * and hasti[ly] in seeking public exposure." The Appeals Review Board determined, however, that the "evidence is insufficient to sustain a conclusion that [petitioner's] statements were actuated by 'malice'" (*id.* at f-17 to f-18). Consequently, even though petitioner's statements had caused "disruption of the orderly day-to-day routine of the agency," the Appeals Review Board concluded that "the balance in the instant case weighs in favor of [petitioner]" (*id.* at f-23). The Appeals Review Board recommended that petitioner be retroactively restored to his former position and awarded back pay (*id.* at f-26), and NASA accepted this recommendation.[1]

3. In 1976, while his administrative appeal was pending, petitioner sued respondent for damages in Alabama state court. Petitioner alleged that respondent had slandered him[2] and had conspired with others to demote him

---

[1] Government records show that petitioner received $30,724.40 in back pay.

[2] Petitioner's defamation claim was based on a statement respondent made, when asked at the conclusion of a press conference, about petitioner's assertions that he had no meaningful work; respondent replied, "I have had [the] statement investigated and I can say unequivocally that such a statement has no basis in fact" (Pet. App. c1-5). The district court held that the defamation claim was precluded under *Barr* v. *Matteo*, 360 U.S. 564 (1959) (Pet. App. d-4 to d-11), and the court of appeals affirmed, both before and after this Court's remand (Pet. App. a-3, c1-6 to c1-10). This holding is not before the Court (Pet. Br. 3 n.1).

in violation of the First Amendment (Pet. App. d-2, d-4). Respondent removed the case to the United States District Court for the Northern District of Alabama, which granted respondent's motion for summary judgment. The district court held that because of petitioner's "administrative review opportunities and the importance of the government's interests in promoting the efficiency and integrity of its public services" (*id.* at d-16), petitioner could not maintain an action for damages under the Constitution.

The court of appeals affirmed, agreeing with the district court that petitioner did not have a constitutional cause of action for damages. The court of appeals cited the elaborate civil service remedies available to petitioner and observed that in *Davis* v. *Passman*, 442 U.S. 228 (1979), the absence of an alternative remedy was central to this Court's decision to find an implied cause of action for damages under the Constitution (Pet. App. c1-10 to c1-14). This Court then granted a petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded the case for further consideration in light of the intervening decision in *Carlson* v. *Green*, 446 U.S. 14 (1980) (Pet. App. b-1; 446 U.S. 914 (1980)).

On remand, the court of appeals again affirmed the district court's decision. Citing *Carlson* v. *Green*, *supra*, 446 U.S. at 18, and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971), the court of appeals stated that it would not confer on petitioner a damages remedy implied directly under the Constitution if there were "special factors counselling hesitation" in finding such a remedy, and it ruled that such factors are present here. Specifically, the court found "the unique relationship between the Federal Government and its civil service employees" to be such a special factor (Pet. App. a-6). The court of appeals explained that "[t]he role of the Government as an employer toward its employees is fundamentally different from its role as sovereign over private citizens generally" (*id.* at a-6 to

a-7). In this connection, the court of appeals noted the numerous cases in which this Court has emphasized the importance of according the government great latitude in the management of " 'its personnel and internal affairs' " (*ibid.*, quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (opinion of Powell, J.)).

The court of appeals also emphasized that its refusal to allow an implied personal damages action would not leave petitioner without a remedy (Pet. App. a-11 to a-12). The court observed that "Congress, rather than the courts, has traditionally carried the burden of regulating the Government employer-employee relationship" (*id.* at a-8 to a-9). The court described the series of statutes in which Congress has provided remedies for aggrieved civil servants (*ibid.*) and noted the administrative remedies petitioner successfully pursued and the judicial remedy that would have been available if petitioner had not been successful before the Civil Service Commission (*id.* at a-9). Pointing out that the civil service remedies were the product of continual congressional "fine tuning," the court explained (*id.* at a-9 to a-10):

> Congress has sought to achieve a proper balance between promoting governmental efficiency and protecting the rights of employees aggrieved by improper personnel action. * * * We * * * emphasize the care Congress has taken to carefully balance the employee's rights as a citizen with the Government's interest in the efficient conduct of the nation's business.

And the court noted that "[t]he very comprehensiveness of the legislative and administrative scheme evinces Congress' awareness of the special relationship and of the Government's responsibilities toward its civil service employees" (*id.* at a-10).

Allowing petitioner the damages remedy he sought, the court said, might "provide a disincentive for Congress to continue improving the mechanisms by which an aggrieved employee can protect his rights" (Pet. App. a-11). In any event, such a remedy would "interfere with

and undermine the traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established" (*id.* at a-10 to a-11).

SUMMARY OF ARGUMENT

A. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court held that a plaintiff who alleges that his constitutional rights have been violated may sue the responsible federal officials for damages, even though Congress has not explicitly established such a remedy. In each case in which the Court has allowed a *Bivens* action, however, it has ensured that it was not acting in a fashion inconsistent with Congress's intent. In particular, the Court has allowed a *Bivens* action only after concluding either that Congress had not addressed the question of how to remedy a particular category of constitutional violations, or that Congress had resolved that question in a way that presupposed a judicially created damages remedy.

In this respect, *Bivens* and its progeny are faithful to the principle—well established in other areas where federal courts have acted in the absence of explicit congressional authority—that when Congress addresses a remedial problem in a way that reflects its intention to occupy the field, that intention must be honored. *Bivens* recognized this principle by stating that an alternative remedy, equally effective in the view of Congress, precludes an implied personal damages action (403 U.S. at 397). Moreover, *Bivens* expressly acknowledged that in some contexts—where there are "special factors counselling hesitation in the absence of affirmative action by Congress" (*id.* at 396)—a court should not afford a traditional judicial remedy even if Congress has not specifically addressed the remedial problem.

The civil service remedies that were available to petitioner, and that he successfully invoked, not only were fully adequate to redress a constitutional violation but reflected Congress's intent to occupy the field in a way that precludes a judicially created *Bivens* remedy. Moreover, special factors arising from the federal employment relationship require, at a minimum, that any doubts be resolved in favor of the preclusive effect of the civil service remedies.

B. 1. Congress has specifically addressed the question of what remedy to afford a civil servant who, like petitioner, complains of an unlawful personnel action. Congress has established an elaborate and integrated remedial scheme, consisting of two levels of administrative consideration followed by judicial review. These remedies are designed to provide full compensation to any federal employee who is the victim of an unconstitutional personnel action.

By providing for judicial review and full compensatory relief, these civil service remedies plainly meet, and exceed, any minimum requirements of adequacy derived from the Constitution itself. Indeed, the civil service remedies are superior to the *Bivens* remedy sought by petioner in several important respects.

Petitioner nonetheless contends that these civil service remedies created by Congress must be supplemented by a personal damages remedy that Congress did not expressly create. Petitioner's principal argument appears to be that the civil service remedies cannot preclude a *Bivens* remedy because the latter arguably provides more of a deterrent and is more favorable to claimants in certain ways—by allowing a recovery against an individual instead of the government, jury trials, and awards of punitive damages. But the assumption that Congress can preclude a *Bivens* action only by providing a remedy that is identical to a *Bivens* remedy (or even more favorable to plaintiffs) is manifestly implausible, and is inconsistent with previous decisions of this Court. See *Brown* v. *General Services Administration*, 425 U.S. 820 (1976). *Biv-*

ens did not hold that punitive damages or personal liability are constitutionally required, and if Congress provides a more complex or refined remedy, and intends that remedy to occupy the field, Congress's intent must control—even if its remedy is in some respects less favorable to claimants.

2. Both the structure and the history of the civil service remedies demonstrate that Congress did not envision that courts would supplement them with judicially created remedies. The civil service remedies are a "careful blend of administrative and judicial enforcement powers" (*Brown* v. *General Services Administration*, *supra*, 425 U.S. at 833) that assign a distinct role to the agency taking the adverse action, the Civil Service Commission, and the reviewing courts. Moreover, the history of the civil service remedies shows that Congress has revisited them repeatedly, fine-tuning the statutes and making adjustments when it perceived an inequity or a new problem. This close congressional superintendence of a complex remedial scheme strongly suggests that Congress took complete responsibility for providing a remedy and did not intend courts to create supplemental remedies Congress did not specifically prescribe.

Moreover, Congress plainly intended the civil service remedies to provide relief for constitutional violations. The impetus behind the Lloyd-LaFollette Act, the statutory basis of the civil service remedies petitioner successfully invoked, was congressional concern with federal employees' First Amendment rights. In general, the history of civil service legislation shows Congress's repeated concern with employees who expose abuses or mismanagement in the government—the precise activity in which petitioner alleges he was engaged—and Congress's strong institutional interest in protecting such employees.

3. When Congress enacted the civil service remedies, there was, of course, no *Bivens* remedy. Moreover, the longstanding tradition was that courts would play little or no role in resolving disputes growing out of civil service employment; the resolution of such disputes was uni-

versally understood to be the province of Congress and the executive branch. When Congress legislates against such a background, it cannot be presumed that Congress envisioned, or left room for, an active judicial role in providing supplemental remedies. Indeed, it should be presumed that Congress intended its remedy to be exclusive.

4. Allowing a personal damages action in this context, where Congress did not envision that one would be created, is not only inconsistent with Congress's intent; it will thwart important congressional policies reflected in the civil service remedies Congress created. Those remedies, as Congress has repeatedly explained, reflect a careful balance between protecting the rights of employees, on the one hand, and not making it unduly burdensome for managers to take needed adverse personnel actions, on the other. Because civil service managers often have little personal incentive to take such actions, this balance is fragile; if it becomes excessively difficult or burdensome for a manager to act, many simply will not act, and the efficiency and morale of the civil service will suffer.

It cannot be disputed that creating a personal damages remedy—which exposes every official who takes or approves an adverse personnel action to the risk of burdensome litigation under a threat of personal liability—will inhibit managers from taking personnel actions, including, necessarily, justified personnel actions. Of course, managers will be protected by the immunity doctrines that this Court has developed in other contexts to balance the rights of individuals against the societal need to allow uninhibited action by public officials. But this balance will be different from the balance Congress has painstakingly struck in the civil service context; and since the balance reflected in Congress's remedial scheme is plainly constitutional, the courts have no warrant to upset it.

C. 1. Certain distinctive aspects of the federal employment relationship suggest additional reasons for the courts to hesitate in creating a judicial remedy in this

context. First, an important premise of *Bivens* and its progeny was that courts historically have played a central role in protecting particularly vulnerable individuals and groups in society. Civil servants are not such a group; Congress has a direct interest in ensuring that the civil service is governed by fair and rational practices that promote efficiency and morale. Congress has an especially strong interest in protecting those who, like petitioner, criticize the performance of their agencies.

Moreover, the courts have been particularly alert to protect persons who, like Bivens himself, are confronted with the sovereign power of the federal government. But petitioner's relationship to the government is not the relationship of citizen to sovereign; in practical terms, it is little different from the relationship of employees to employers throughout society. Had a private employer demoted petitioner for his statements, the concrete effect on petitioner would have been little different, and petitioner would have had only contractual remedies. This does not mean, of course, that the government is not bound by the First Amendment in its dealings with its employees; but it does mean that those employees have less of a claim to special judicial protection and a judicially created remedy.

2. In a *Bivens* action, petitioner's claims would be considered de novo by a court. A consistent theme of federal labor policy, in the public and private sector alike, is that courts should, if possible, avoid addressing employment disputes in the first instance. Those disputes should instead be considered by specialized bodies that are well-versed in the peculiarities of the employment relationship, and judicial review should accordingly be limited. The civil service remedies enabled petitioner to obtain full compensatory relief in a way that is consistent with this traditional approach; the *Bivens* remedy that petitioner seeks is unnecessary to compensate him and would require courts to intrude into an area they traditionally have avoided.

ARGUMENT

A FEDERAL EMPLOYEE CHALLENGING A DEMOTION WHO CAN OBTAIN REINSTATEMENT AND BACK PAY THROUGH CIVIL SERVICE REMEDIES MAY NOT ALSO SEEK DAMAGES, UNDER AN IMPLIED CONSTITUTIONAL CAUSE OF ACTION, FROM AN OFFICIAL WHO APPROVED THE DEMOTION

A. Introduction

1. Although the Constitution establishes rights, it does not in general specify the remedy for violations of those rights. Congress and the courts, therefore, must prescribe remedies for constitutional violations; and it is axiomatic that unless the Constitution itself requires a particular form of relief, a federal court cannot provide a remedy unless it is authorized to do so, explicitly or implicitly, by statute. See, *e.g.*, *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448-449 (1850); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (Marshall, C.J.) ("[T]he power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law.").

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court allowed a plaintiff to seek damages from federal officials for an alleged violation of his Fourth Amendment rights. The Court specifically noted that it was not holding that the Constitution itself required the creation of this remedy (*id.* at 397), and Congress had not explicitly authorized such relief. But the Court proceeded, in two steps, to reconcile its creation of a damages remedy with the principle that the power to create a remedy must be derived from a statute.

First, the Court noted that Congress had granted federal district courts general jurisdiction (28 U.S.C. 1331(a)) to entertain claims arising under the Constitution. See 403 U.S. at 396, quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); 403 U.S. at 405 (Harlan, J., concurring). Second, the Court noted that Congress itself had

not prescribed a more specific remedy for Fourth Amendment violations; the defendants' contention was that state law was the appropriate source of a remedy. See 403 U.S. at 390, 397. Since Congress had not established a specific remedy—but had created courts with jurisdiction over the claim—the Court in *Bivens* concluded that federal courts were free to provide the remedies, including damages, that courts "[h]istorically" and "normally" have provided. See 403 U.S. at 395, 397; see also *id.* at 405, 408 n.8 (Harlan, J., concurring); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting) ("Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies * * *.").

In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court followed *Bivens* and concluded that the plaintiff—who claimed that she had been discharged from her position as a congressional employee because of her sex, in violation of the Fifth Amendment—had an implied damages remedy under the Constitution. 442 U.S. at 241-242, 245. In *Davis*, unlike *Bivens*, there was a relevant statutory remedial scheme—Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, which provides a remedy for most acts of employment discrimination by the federal government. But the Court noted that Section 717 did not address the remedial question at issue in *Davis* itself; congressional employees are excluded from the coverage of Section 717 (see 42 U.S.C. 2000e-16(a)), and, the Court ruled, Congress did not intend this exclusion to leave congressional employees remediless by precluding them from invoking other remedies for unconstitutional employment discrimination. See 442 U.S. at 247; page 40 note 22, *infra*. The Court accordingly held that the plaintiff retained "the judicial remedies * * * [she] might otherwise possess" (442 U.S. at 247).

In *Carlson* v. *Green*, 446 U.S. 14 (1980), Congress unquestionably had addressed the remedial question. The

plaintiff—the survivor of a prisoner whose Eighth Amendment rights were allegedly violated by federal authorities—could have brought suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, for the wrongs asserted in the complaint. But the Court concluded, principally on the basis of legislative history that it described as "crystal clear" (446 U.S. at 20), that "Congress * * * contemplate[d] that victims of the kind of intentional wrongdoing alleged in [the] complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights" (*ibid.*). See also *id.* at 19 n.5 ("Congress * * * view[ed the FTCA remedy] as fully adequate only in combination with the *Bivens* remedy.").

2. In each of these cases, the sole statutory source of the damages remedy was a grant of jurisdiction. In each case, before allowing the remedy, the Court ensured that Congress either had not addressed the question of what remedy to afford in a more specific fashion, or had addressed it in a way that did not occupy the field and therefore did not preclude an implied judicial remedy. In these respects, *Bivens* and its progeny resemble other forms of federal judge-made law—ordinarily described as federal common law—that are based solely on the authority of a jurisdictional grant. See, *e.g.*, *Fitzgerald* v. *United States Lines*, 374 U.S. 16, 20 (1963) (admiralty); *Kansas v. Colorado*, 206 U.S. 46 (1907) (suits between states in this Court's original jurisdiction); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957) (suits under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. 185(a)).[3]

---

[3] See also *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corp.*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) ("Federal common law implements the federal Constitution and statutes"); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 798 (2d ed. 1973); Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 23-24 (1975).

In every area of federal common law, the Court has "consistently * * * emphasized that the federal lawmaking power is vested in the legislative, not the judicial branch of government; therefore, federal common law is 'subject to the paramount authority of Congress.' " *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95-96 (1981), quoting *New Jersey* v. *New York*, 283 U.S. 336, 348 (1931). The Court has recently noted that "[e]ven in admiralty, * * * where the federal judiciary's lawmaking power may well be at its strongest, it is [the Court's] duty to respect the will of Congress." *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra*, 451 U.S. at 96. Consequently, should Congress prescribe a specific remedy for a category of constitutional violations, and intend that remedy to occupy the field in a way that preempts a *Bivens* remedy, Congress's intent is controlling. See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 722 (1949) (Frankfurter, J., dissenting) ("[T]he sovereign can constitutionally change the traditional rules of liability for the tort of the agent by providing a fair substitute.").[4]

It might be suggested that the *Bivens* remedy differs from other forms of federal common law because it protects constitutional rights. The special role of the courts in protecting constitutional rights was, indeed, a major element of the justification for the Court's decision in *Bivens* to infer authority to create a remedy from a grant

---

[4] See also Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118 (1969) ("[T]he fact that a constitutional remedy has been judicially prescribed in the absence of legislation does not mean that the legislature lacks power to prescribe an adequate substitute."); Katz, *The Jurisprudence of Remedies: Constitutional Legality And The Law of Torts In Bell* v. *Hood*, 117 U. Pa. L. Rev. 1, 5 (1968).

of jurisdiction (see, *e.g.*, *Bivens*, *supra*, 403 U.S. at 407 (Harlan, J., concurring); *Davis* v. *Passman*, *supra*, 442 U.S. at 241-242), because "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981), citing *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973). See, *e.g.*, *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

But the fact that a *Bivens* remedy involves constitutional rights does not alter the basic nature of the inquiry, which is whether allowing that remedy is consistent with Congress's intent.[5] Even assuming that the Constitution of its own force requires that there be some remedy for a violation of its provisions, *within* that constitutional limit there is no reason to deny Congress the power to prescribe remedies for constitutional violations as broad as its power to legislate on other subjects. See, *e.g.*, *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 250 (1845); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366-1367 (1953); compare *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), with *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868). Accordingly, while the inquiry into congressional intent necessarily takes into account every relevant factor (see *Brown* v. *General Services Administration*, 425 U.S. 820, 825 (1976), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805))—including the status and importance of the rights involved and their claim to judicial solicitude (see pages 42-44, *infra*) —the question whether legislation preempts judge-made law must ultimately depend, in the *Bivens* area as elsewhere, upon whether Congress intended to occupy the

---

[5] Notably, the bodies of federal common law governing suits in admiralty and between the states also have a constitutional basis. See Article III, Section 2. See also *City of Milwaukee* v. *Illinois*, *supra*, 451 U.S. at 334-335 (Blackmun, J., dissenting) (discussing basis of federal common law of interstate nuisance that was held preempted by legislation).

field. See *City of Milwaukee* v. *Illinois*, *supra*, 451 U.S. at 338-339 & n.8 (Blackmun, J., dissenting).

In *Bivens* and its progeny, the Court has organized the inquiry into congressional intent by establishing two principles. First, recognizing that a judicially-created remedy would be inappropriate if Congress had specifically addressed the remedial question, the Court has ruled that it would not create an implied damages remedy if there exists "another remedy, equally effective in the view of Congress." *Bivens*, *supra*, 403 U.S. at 397; see *Carlson* v. *Green*, 446 U.S. at 19; *Davis* v. *Passman*, *supra*, 442 U.S. at 248. Second, recognizing that in some contexts Congress may not have intended its grant of federal question jurisdiction to serve as a basis for providing traditional judicial remedies, the Court has ruled that "special factors counselling hesitation in the absence of affirmative action by Congress" (*Bivens*, *supra*, 403 U.S. at 396; see *Carlson* v. *Green*, *supra*, 446 U.S. at 18; *Davis* v. *Passman*, *supra*, 442 U.S. at 245) preclude an implied damages action even if Congress has not established an alternative remedy.

We submit that the civil service remedies that were available to petitioner (and were successfully invoked by him) are an alternative remedy that bars a *Bivens* action. See *Bishop* v. *Tice*, 622 F.2d 349, 357 (8th Cir. 1980).[6] Moreover, there are special factors, incident to the federal employment relationship, that at a minimum require any doubts to be resolved in favor of the preclusive effect of the civil service remedies. See *Arnett* v.

[6] No circuit has resolved this issue adversely to our position. See also *Avitzur* v. *Davidson*, 549 F. Supp. 399 (N.D.N.Y. 1982); *Purtill* v. *Harris*, 658 F.2d 134 (3d Cir. 1981), petition for cert. pending, No. 81-1010 (filed Nov. 23, 1981); *Broussard* v. *United States Postal Service*, 674 F.2d 1103, 1112-1113 (5th Cir. 1982). Petitioner cites (Pet. Br. 22-23 n.10) *Sonntag* v. *Dooley*, 650 F.2d 904 (7th Cir. 1981), but we have explained (Br. in Opp. 11-12) why *Sonntag* is not in conflict with the court of appeals' decision in this case. We note in addition that on August 17, 1982, the Seventh Circuit granted rehearing en banc in *Egger* v. *Phillips*, 669 F.2d 497 (1982), apparently to reconsider this issue.

Kennedy, 416 U.S. 134, 168 (1974) (opinion of Powell, J.) ("[T]o perform its responsibilities effectively and economically, * * * the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."); *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974), quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961) ("the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'").

B. The Civil Service Remedies Available to Petitioner Precluded an Implied Constitutional Damages Action

Plainly this is not a case like *Bivens* itself, in which Congress had not specifically addressed the remedial question; Congress and agencies acting pursuant to its authority have established an administrative and judicial remedial scheme for civil servants challenging personnel actions. Nor is this a case like *Davis* v. *Passman*, in which the particular claimant was excluded from a comprehensive remedy; petitioner successfully invoked the civil service remedies. Instead, the question here is whether the civil service remedies explicitly established by Congress should be supplemented by a judicially-created personal damages remedy that Congress has not expressly authorized.

1. The Differences Between the Civil Service Remedies and the Implied Damages Remedy Do Not Require That Petitioner Be Allowed To Bring a Damages Action

Under the Lloyd-LaFollette Act, 5 U.S.C. 7501(a), petitioner could not be demoted "except for such cause as will promote the efficiency of [the civil] service." See 5 C.F.R. 752.104(a) (1975). See also 5 U.S.C. (Supp. V) 7513(a). This standard prohibits adverse actions that violate the First Amendment (*Arnett* v. *Kennedy*, 416 U.S. 134, 162 (1974) (opinion of Rehnquist, J.); *id.* at 164 (opinion of Powell, J.); *id.* at 177 (opinion of White, J.)); indeed, the principal and express concern of the Congress that first enacted this standard was to protect

the First Amendment rights of civil servants (see page 30, *infra*). As we have noted, the Civil Service Commission's Federal Employee Appeals Authority and Appeals Review Board both considered petitioner's First Amendment claims specifically and in detail; the Appeals Review Board reopened the case to consider them, and ruled in his favor. Had petitioner not prevailed before the administrative agencies, a reviewing court would have been required to set aside an unconstitutional personnel action (see page 20, *infra*). There is no question, therefore, that the civil service remedies were capable of correcting a constitutional violation.

These remedies consisted of elaborate administrative proceedings, followed by judicial review. Petitioner was entitled to receive written notice of the reasons for the proposed adverse action and to examine all disclosable materials that formed the basis of the proposed action. 5 C.F.R. 752.202(a)(1975). He then had the right to answer the charges and to "make any representations which [he] believe[d] might sway the final decision on his case" (5 C.F.R. 752.202(b)(1975)) before agency officials empowered either to make or to recommend a decision on the proposed action. The final agency decision was to be "made by a higher level official of the agency * * * than the officer who proposed the adverse action." 5 C.F.R. 752.202(f)(1975). Here, as we have noted, an official below respondent who is not a party proposed petitioner's removal, and respondent, who was required to review that proposal, authorized only petitioner's demotion.

Petitioner was then entitled to appeal to the Civil Service Commission's Federal Employee Appeals Authority. 5 C.F.R. 752.203 and 772.101 (1975). The burden in Commission proceedings was on NASA to sustain its action, not on petitioner. See *Bishop* v. *Tice*, *supra*, 622 F.2d at 357 n.15. The Appeals Authority held a trial-type hearing, at which petitioner had the opportunity to present witnesses and cross-examine other witnesses, and to require the attendance of NASA officials except in limited cir-

cumstances. 5 C.F.R. 772.307(c) (1975). Rules of evidence are not strictly applied at this hearing. 5 C.F.R. 772.307(c) (1975). Petitioner also had, and successfully invoked, the right to ask the Commission to reopen an adverse decision. 5 C.F.R. 772.310 (1975).

In addition, petitioner was entitled to seek judicial review of an adverse Commission decision by filing suit in federal district court or in the Court of Claims. See generally Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 Cornell L. Rev. 178, 179-182, 185-186 (1972) (citing cases). The Commission's decision was reviewed on the record (see, *e.g.*, *Twiggs* v. *Small Business Administration*, 541 F.2d 150, 152 (3d Cir. 1976)) and could be set aside if it was arbitrary and capricious, unsupported by substantial evidence, legally erroneous, or the product of a failure to follow proper procedures.[7] When he prevailed, petitioner was entitled to reinstatement with full back pay.[8]

This remedial scheme was fully adequate to protect petitioner's rights not to be discharged or demoted in violation of the Constitution. Indeed, in many respects, these civil service remedies were more favorable to petitioner than a *Bivens* action: he did not bear the burden of proof, as he would in a *Bivens* suit; he did not have to overcome an immunity defense in order to prevail (see *Butz* v. *Econo-*

---

[7] See, *e.g.*, *Young* v. *Hampton*, 568 F.2d 1253, 1256-1257 (7th Cir. 1977); *Bielec* v. *United States*, 456 F.2d 690, 695 (Ct. Cl. 1972); *Armstrong* v. *United States*, 405 F.2d 1275, 1277 (Ct. Cl.), cert. denied, 395 U.S. 934 (1969); *Toohey* v. *Nitze*, 429 F.2d 1332, 1334 (9th Cir. 1970), cert. denied, 400 U.S. 1022 (1971); *Charlton* v. *United States*, 412 F.2d 390, 395 (3d Cir. 1969); *Vigil* v. *Post Office Department*, 406 F.2d 921, 924 (10th Cir. 1969); *Dabney* v. *Freeman*, 358 F.2d 533, 535 (D.C. Cir. 1965); *Jenkins* v. *Macy*, 237 F. Supp. 60, 62 (E.D. Mo. 1964), aff'd, 357 F.2d 62 (8th Cir. 1966).

[8] After petitioner brought this *Bivens* action, Congress enacted the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. The Act revised the available remedies, but it preserved their basic structure. We describe the CSRA remedies at pages 32-33, *infra*.

mou, 438 U.S. 478 (1978)); his relief included reinstatement, which a *Bivens* remedy could not; and the procedures were more informal and less costly than a lawsuit.[9]

Petitioner asserts, however, that courts must provide a *Bivens* remedy because it differs from the civil service remedies in three additional respects. See, *e.g.*, Pet. Br. 23-29. First, if a claimant successfully pursues his civil service remedies, he recovers from the government; in a *Bivens* action, he recovers from the defendant official personally. Second, the civil service remedies provide for agencies to adjudicate the claim in the first instance, subject to limited judicial review; a *Bivens* claim is tried de novo by a court, and the plaintiff can request a jury (see *Carlson* v. *Green*, *supra*, 446 U.S. at 22). Third, punitive damages are apparently available in a *Bivens* action (*Carlson* v. *Green*, *supra*, 446 U.S. at 22) but cannot be recovered through the civil service remedies.[10]

Instead of analyzing Congress's intent, however, petitioner appears to argue that the civil service remedies cannot preclude a *Bivens* action because they differ from a *Bivens* remedy in these ways and therefore are, according

---

[9] An empirical study found that in 1970 approximately one-half of those employees who appealed reductions in grade or pay to the Civil Service Commission were successful. In addition, approximately one-fourth of those who challenged their demotions before the agency were successful. See Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 Va. L. Rev. 196, 204 n.35 (1973).

[10] Petitioner also asserts (*e.g.*, Pet. Br. 24-26) that he can receive a larger compensatory award in a *Bivens* action. In view of Congress's explicit determination that the award provided under the Back Pay Act of 1966, 5 U.S.C. (& Supp. V) 5596 (the statute that authorized the monetary award to petitioner), fully compensates aggrieved employees (see pages 31-32, *infra*), this claim seems plainly incorrect. In addition, we see no basis for petitioner's repeated claim (Pet. Br. 14, 24, 25, 26) that he could receive, as part of his recovery in a *Bivens* suit, the attorney's fees he incurred in pursuing the civil service remedy. Cf. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980).

to petitioner, less favorable to claimants and less of a deterrent.[11] See, *e.g.*, Pet. Br. 14, 16, 27-29. This argument purports to be based on *Carlson* v. *Green*, *supra*, but in *Carlson* the Court examined the differences between a *Bivens* action and the alternative FTCA remedy only to determine if they "support[ed the] conclusion that Congress did not intend to limit [a claimant] to an FTCA action." 446 U.S. at 20-21.[12] Moreover, petitioner's argument is plainly inconsistent with *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), where the Court held that Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, is the exclusive remedy for employment discrimination by the federal government. Under *Brown*, a federal employee may not bring a *Bivens* action alleging unconstitutional employment discrimination if he has a remedy under Section 717. See *Davis* v. *Passman*, *supra*, 442 U.S. at 247 n.26; *Gissen* v. *Tackman*, 537 F.2d 784 (3d Cir. 1976) (en banc).[13] Title VII remedies for civil service actions based on impermissible factors such as race or sex are in many ways similar to the civil service remedies petitioner invoked. In particular, a Title VII plaintiff who prevails recovers from the gov-

---

[11] The civil service remedies, of course, do not fail to provide a deterrent; a manager may be disciplined for taking improper actions. The Civil Service Reform Act of 1978 provides a specific disciplinary system for managers who violate their subordinates' constitutional rights. See page 33, *infra*.

[12] In addition, one of the differences between a *Bivens* action and an FTCA action that the Court considered significant in *Carlson* was that "an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward * * * [while] the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." 446 U.S. at 23. See also *id.* at 28 & n.1 (Powell, J., concurring in the judgment). Civil service remedies, of course, do not vary with state law but are governed by federal standards.

[13] See also *Purtill* v. *Harris*, 658 F.2d 134 (3d Cir. 1981), petition for cert. pending, No. 81-1010 (filed Nov. 23, 1981).

ernment, not an individual, and cannot obtain punitive damages (42 U.S.C. 2000e-5(g), 2000e-16(c)), and there is no right to a jury trial under Title VII (see *Lehman* v. *Nakshian*, 453 U.S. 156, 164 (1981)).

In any event, the assumption on which petitioner's argument rests—that an alternative remedy cannot preclude a *Bivens* remedy unless it is equally or more favorable to claimants—is obviously implausible. In repeatedly recognizing that Congress may preclude a *Bivens* remedy by enacting a substitute remedy that is "equally effective in the view of Congress," the Court could not have meant that Congress may create only a statutory remedy identical to (or more favorable to plaintiffs than) a *Bivens* action.[14] A compensatory remedy against the government is surely more than is needed to satisfy the Constitution itself; we know of no case holding that the Constitution requires officials to be punished for unconstitutional acts. See *Bivens*, *supra*, 403 U.S. at 397.[15] Indeed, the Court has squarely rejected the argument that a remedy for government misconduct does not satisfy minimum constitutional requirements unless it provides for personal liability, a jury trial, and punitive damages; "remedies * * * [that] could have fully compensated [a claimant] for the * * * loss he suffered * * * are sufficient to satisfy the requirements of due process." *Parratt* v. *Taylor*, 451 U.S. 527, 543-544 (1981).

---

[14] See *Tarpley* v. *Greene*, 684 F.2d 1, 11 n.24 (D.C. Cir. 1982) (Edwards, J.) ("We do not believe the Court in *Bivens* meant, by using the word 'equally effective,' that federal courts could expand an implied cause of action under the Constitution in order to circumvent the remedy prescribed by Congress simply because Congress saw fit to limit that remedy in some fashion.").

[15] See also Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 85-89 & n.212 (1981) ("[T]he adequacy of remedies for constitutional wrongs should turn on the question whether a litigant is protected or made whole, and should not embrace deterrence concerns, over which the legislature should enjoy considerable discretion.").

It cannot seriously be contended, for example, that Congress would violate the Constitution if it enacted a statute prohibiting the award of punitive damages in *Bivens* actions and establishing a mechanism to indemnify federal officials found liable in *Bivens* actions—even though the effect of such a statute would be to leave claimants with a compensatory remedy against the government. There is no reason to require a different result if Congress instead affirmatively enacts a compensatory remedy against the government and reveals its intention to preclude a *Bivens* action. See *City of Milwaukee* v. *Illinois*, *supra*, 451 U.S. at 324 (footnote omitted) ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner.").

The *Bivens* remedy was not selected as a benchmark that all other remedies must meet; as the opinions in *Bivens* explain, it was selected because it is a traditional judicial remedy, and a court acting under the sole authority of a jurisdictional grant cannot exceed the traditional understanding of a court's powers. But a legislature can be more creative; it can design a more complex and refined remedial scheme, or it can establish administrative agencies and empower them to do so. "Congress is not confined to traditional forms or traditional remedies. * * * In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240 (1937).

At bottom, petitioner's argument that he must be allowed a *Bivens* remedy because it will provide a larger possible recovery and a supposedly better deterrent fails to recognize that every remedial scheme reflects a particular balance of competing interests. As the court of appeals indicated (Pet. App. a-8 to a-10), an award of damages against individual officials may deter some wrongdoing, but it also greatly increases the risk of "overdeterrence" (see *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra*, 451 U.S. at 637)—inhibiting officials from taking justified actions in the public interest because they fear they will face litigation and the threat

of personal liability. See *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 13, quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950); Landes & Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1 (1975). Similarly, a remedial scheme that allows a specialized agency instead of a court and jury to resolve a dispute in the first instance may lose some of the benefits of judicial independence—although the loss is minimal when, as here, the agency's action is subject to judicial review—but it gains the advantages of the agency's expertise and familiarity with the employment situation.

Within the limits set by the Constitution, it is for Congress to strike the proper balance; if Congress strikes a particular balance that the Constitution permits, the courts have no warrant to upset it. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra*, 451 U.S. at 97-98, citing *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 623 (1978).[16] In *Bivens*, *Davis*, and *Carl-*

---

[16] See also Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1549 (1972) ("Congress should be free to revise with an adequate alternative any remedy which is not determined by the Court to be indispensable but which is merely selected by the Court as one appropriate method of carrying into effect a substantive constitutional right."). For example, 42 U.S.C. (Supp. IV) 1983 does not permit a damages action against a municipality on a respondeat superior theory, although it permits a suit against the officials themselves. See *Monell* v. *Department of Social Services*, 436 U.S. 658, 691-694 (1978). The courts of appeals have unanimously held that a plaintiff does not have an implied constitutional damages action against a municipality on a respondeat superior theory—even though such an action, against a wealthier defendant likely to arouse less jury sympathy, would undoubtedly give a plaintiff a better prospect of recovery. See, *e.g.*, *Tarpley* v. *Greene*, 684 F.2d 1, 9-11 (D.C. Cir. 1982); *Ellis* v. *Blum*, 643 F.2d 68, 85 (2d Cir. 1981); *Dean* v. *Gladney*, 621 F.2d 1331, 1334-1337 (5th Cir. 1980), cert. denied, 450 U.S. 983 (1981); *Jones* v. *City of Memphis*, 586 F.2d 622, 624-625 (6th Cir. 1978), cert. denied, 440 U.S. 914 (1979); *Molina* v. *Richardson*, 578 F.2d 846, 847-854 (9th Cir.), cert. denied, 439 U.S. 1048 (1978). See also *Bishop* v. *Tice*, *supra*,

son, the Court created an implied remedy only after determining either that Congress had not struck a particular balance or, in *Carlson*, that the balance Congress struck presupposed a personal damages remedy. For these reasons, a remedy prescribed by Congress should be regarded as "equally effective in the view of Congress," and therefore as precluding a *Bivens* remedy, when Congress deems it as effective in achieving the proper balance of the competing interests—not just in promoting those interests that favor the plaintiff.

2. *The Complexity of the Civil Service Remedies, and Their Frequent Adjustment, Reflect Congress's Intent to Occupy the Field*

The civil service remedies available to petitioner were prescribed or authorized by statutes enacted before *Bivens* was decided. See pages 29-32, *infra*. It is therefore pointless to seek an explicit expression of legislative intent to preclude a *Bivens* remedy.[17] Congress had no reason to believe that there were any other possible remedies available to civil servants; it thus had no reason to address the question of whether the remedies it prescribed were exclusive. Consequently, in order to determine whether a *Bivens* remedy should be created, the Court must examine other indicia of legislative intent—the structure of the civil service remedies, the presuppositions about the judicial role that existed when they were enacted, and Congress's care in shaping the remedies—to determine whether Congress intended to occupy the field in a way that leaves no room for judicially-created remedies.

---

622 F.2d at 356 n.12; *Cale* v. *City of Covington*, 586 F.2d 311, 317-318 (4th Cir. 1978); *Mahone* v. *Waddle*, 564 F.2d 1018, 1024-1025 (3d Cir. 1977).

[17] We believe, however, that the legislative history of the first civil service legislation passed after *Bivens*—the Civil Service Reform Act of 1978—does contain what amounts to a clear statement that Congress did not intend *Bivens* remedies to be conferred. See pages 40-41 note 22, *infra*.

The Court has frequently recognized that "when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement," it very likely intended to exclude other remedies. *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra*, 451 U.S. at 97. See also *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra*, 451 U.S. at 645; *Universities Research Association, Inc.* v. *Coutu*, 450 U.S. 754, 773 & n.24 (1981). In *City of Milwaukee* v. *Illinois*, *supra*, the Court held that the federal common law of interstate water pollution, which has a quasi-constitutional character (see page 16 note 5, *supra*), was preempted by the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (& Supp. IV) 1251 *et seq.*, because the Amendments established "a comprehensive regulatory program supervised by an expert administrative agency." 451 U.S. at 317. In *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 19-21 (1981), the Court ruled that a "comprehensive enforcement mechanism[]" precluded previously existing, open-ended judicial authority to provide a remedy even though that authority derived from a statute—42 U.S.C. (Supp. IV) 1983, as interpreted in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980)—and therefore raised no questions about the courts' exceeding their proper role. See Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394 (1982).

Most salient, however, is *Brown* v. *General Services Administration*, *supra*, which, as we have noted, established that a federal employee may not bring a *Bivens* action alleging unconstitutional employment discrimination if he has a remedy under Section 717 of the Civil Rights Act of 1964. The holding in *Brown* rests in large measure on the Court's conclusion that Section 717 is a "careful and thorough remedial scheme" that "provides for a careful blend of administrative and judicial enforcement powers" (425 U.S. at 833). "The balance, completeness, and structural integrity of [the remedy] are inconsistent with the * * * contention that

the * * * remedy * * * was designed merely to supplement other putative judicial relief" (*id.* at 832).

Judged by these standards, the Civil Service remedies available to petitioner plainly precluded a judicially created damages remedy. The civil service remedies, on their face, reflect a careful distribution of functions between the agency concerned and the Civil Service Commission, with the courts playing a reviewing role. Congress intended to allow adverse personnel actions to be taken relatively expeditiously, with more careful consideration by the Commission, and then the courts, to follow. See *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 168 (opinion of Powell, J.); *Sampson* v. *Murray*, *supra*, 415 U.S. at 74-75. But Congress also legislated specific procedural safeguards for the employee, even at the agency level. See 5 U.S.C. 7501(b). This "careful blend of administrative and judicial enforcement powers" (*Brown* v. *General Services Administration*, *supra*, 425 U.S. at 835) in a "detailed and specific" remedial scheme (*Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra*, 451 U.S. at 644) that is "supervised by an expert administrative agency" (*City of Milwaukee* v. *Illinois*, *supra*, 451 U.S. at 317) strongly suggests that Congress did not envision, or leave room for, an active judicial role in providing supplemental remedies.

Moreover, as the court of appeals noted (Pet. App. a-8 to a-10), Congress addressed itself to the civil service remedies repeatedly, making adjustments when it perceived an inequity or was faced with a new problem. This frequent fine-tuning demonstrates that Congress took on itself the responsibility for "superintendence of the field" of civil servants' remedies (*Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963)); Congress was "careful and thorough" in ensuring the "balance, completeness, and structural integrity" (*Brown* v. *General Services Administration*, *supra*, 425 U.S. at 833, 832) of this remedy. This, too, reflects Congress's strong presupposition that the courts would not play an active role in creating additional remedies that Congress or the executive branch did not provide.

a. Congress's first significant effort to regulate the selection and tenure of federal employees was the Pendleton Act of 1883 (Act of Jan. 16, 1883, ch. 27, 22 Stat. 403). This statute was in large measure the product of opposition to the "spoils system," under which employees were hired and fired because of their political affiliation. See R. Vaughn, *Principles of Civil Service Law* 1-3 to 1-18 (1976). The Act required competitive examinations for classified positions (Section 1, 22 Stat. 403) and specified that no person in the classified service was to be "removed or otherwise prejudiced" for refusing to engage in political activity (Section 2, 22 Stat. 404). In enacting the Pendleton Act, Congress declared its intention to "pursue[] a middle course" between "life tenure of appointees [and] removals at the will of the appointing power" (H.R. Rep. No. 1826, 47th Cong., 2d Sess. 1 (1882)) and expressed hope that experience under the Act would reveal "how much further it will be both safe and expedient to go" (*ibid.*).

The Pendleton Act also established the Civil Service Commission, required that it be bipartisan, and authorized it "[t]o aid the President * * * in preparing suitable rules for carrying this act into effect" (Section 2, 22 Stat. 403). In 1897, President McKinley issued a civil service rule providing that "[n]o removal shall be made from any position subject to competitive examination except for just cause and upon written charges * * * of which the accused shall have full notice and an opportunity to make defense." See *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 149 n.19 (opinion of Rehnquist, J.). In 1912, Congress enacted the Lloyd-LaFollette Act, which codified and expanded on this civil service rule. Act of Aug. 24, 1912, ch. 339, Section 6, 37 Stat. 555. That act prohibited an employee from being removed from a classified position except "for such cause as will promote the efficiency of [the civil] service * * *." It also required that employees be given written notice of the charges against them and a reasonable time to respond.

b. The legislative history of the Lloyd-LaFollette Act shows that at the time it was enacted, Congress was concerned with "gag orders" issued by Presidents Taft and Roosevelt that prohibited federal employees from "directly or indirectly, individually or through associations, * * * influenc[ing] or attempt[ing] to influence in their own interest any * * * legislation whatever, either before Congress or its committees, or in any way save through the heads of the departments * * * under which they serve, on penalty of dismissal from the Government service." 48 Cong. Rec. 4513 (1912); *id.* at 5223; see, *e.g.*, *id.* at 4653 (remarks of Rep. Calder); *id.* at 5637 (remarks of Rep. Wilson); *id.* at 10730 (remarks of Sen. LaFollette). In response to the gag orders, the Lloyd-LaFollette Act, in addition to providing procedural guarantees, protected the "right of persons employed in the civil service * * * to furnish information to either House of Congress, or to any committee or member thereof * * *."

In urging the adoption of the Lloyd-LaFollette Act, members of Congress asserted that federal employees' constitutional rights—specifically their First Amendment rights—were at stake. See, *e.g.*, 48 Cong. Rec. 4738 (1912) (remarks of Rep. Blackmon); *id.* at 5201 (remarks of Rep. Prouty); *id.* at 5223 (remarks of Rep. O'Shaunessy); *id.* at 5635 (remarks of Rep. Lloyd); *id.* at 10673 (remarks of Sen. Reed) (quoting First Amendment); *id.* at 10732, 10799 (remarks of Sen. LaFollette); *id.* at 10803 (remarks of Sen. Williams). They explained that the gag orders, and the threat to civil servants' First Amendment rights, were a principal reason for all of the protections of the Lloyd-LaFollette Act—including the procedural requirements. See, *e.g.*, 48 Cong. Rec. 4653 (1912) (remarks of Rep. Calder); *id.* at 5207 (remarks of Rep. Konop); *id.* at 5638 (remarks of Rep. Wilson); *id.* at 10675 (exchange among Sens. Reed, Cummins, and Bristow); *id.* at 10795 (remarks of Sen. Smith).

c. The procedural protections granted by the Lloyd-LaFollette Act were themselves expanded step-by-step.

The Veterans Preference Act of 1944 (Act of June 27, 1944, ch. 287, Section 14, 58 Stat. 391), 5 U.S.C. 7501 and 7512, extended the basic Lloyd-LaFollette protections to "adverse actions," required that the employee be allowed to respond orally and in writing, and established the right to an appeal from an agency action to the Civil Service Commission—but only for veterans. The Back Pay Act of 1948 (Act of June 10, 1948, ch. 447, 62 Stat. 354), extended the protections against removal contained in the original Lloyd-LaFollette Act to all employees in the competitive service who were suspended without pay. Executive Orders (Exec. Order No. 10988, 27 Fed. Reg. 551 (1962); Exec. Order No. 11491, 34 Fed. Reg. 17605 (1969)) extended the right to an appeal to all employees in the competitive service, and made the administrative remedy applicable to all adverse actions. Civil Service Commission regulations (5 C.F.R. 772.307 (1975)) provided for a trial-type hearing before the Commission.

Similarly, Congress adjusted, step by step, the compensation available to a civil servant found to have been wrongfully discharged, suspended, or demoted. Before 1948, back pay was not generally available even to those who successfully invoked their civil service remedies. See H.R. Rep. No. 1436, 80th Cong., 2d Sess. 3 (1948). The Back Pay Act of 1948 amended the Lloyd-LaFollette Act to permit back pay awards to victims of improper reductions in force, and to nonveterans in the competitive service and all nonprobationary veterans who were improperly removed or suspended.

In the Back Pay Act of 1966, which authorized the award of back pay to petitioner, Congress closed the remaining gaps. See *United States* v. *Testan*, 424 U.S. 392, 405-406 (1976). The Back Pay Act of 1966 is a "broad remedy * * * [providing] full compensation" (*Sampson* v. *Murray*, *supra*, 415 U.S. at 82-83); its legislative history shows that it was intended to be "perfecting legislation" (S. Rep. No. 1062, 89th Cong., 2d Sess.

4 (1966)) that "establishe[d] on a uniform basis the principle that a Government officer or employee is entitled to pay or benefits lost as a result of a personnel action which subsequently is found to be unjustified" (*id.* at 3). The legislative history also shows that Congress considered the relief provided by the Act sufficient to "put[] the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place." *Id.* at 1. See also H.R. Rep. No. 32, 89th Cong., 1st Sess. 5 (1965) (Back Pay Act "establishes and applies * * * the principle that a Government officer or employee should be made whole following the correction of an unjustified or unwarranted personnel action. * * * This adjustment will cover everything to which such officer or employee normally would have been entitled if the personnel action had not occurred."); 111 Cong. Rec. 2476 (1965) (remarks of Rep. Beckworth).

d. These were the statutes in force when petitioner was demoted. Subsequently, Congress again considered the question of civil service remedies and revised them in the Civil Service Reform Act of 1978 (CSRA). CSRA remedies were not available to petitioner, and we do not invoke the Act as part of the alternative remedy that precludes petitioner's *Bivens* action. But the CSRA is instructive because it reveals that Congress continued its concern with the details of the civil service remedies. The CSRA also reveals continuities in the problems Congress perceived, and in the structure of the remedies it provided to deal with them.

The CSRA divided the functions of the Civil Service Commission between the Office of Personnel Management and the Merit Systems Protection Board; the Board succeeded to the Commission's adjudicative functions. 5 U.S.C. (Supp. V) 1205 and 7701. In disciplinary cases, the agency taking an adverse action again bears the burden of persuasion before the Board. 5 U.S.C. (Supp. V) 7701(c). The Board's decisions are reviewable, on the record, by the United States Court of Appeals for the Federal Circuit. 5 U.S.C. (Supp. V) 7703; Federal Courts

Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Like Civil Service Commission decisions, they may be set aside if they are unsupported by substantial evidence, arbitrary or capricious, or "otherwise not in accordance with law" (5 U.S.C. (Supp. V) 7703(c)(1)).

Notably, the Congress that enacted the CSRA, like the Congress that enacted the Lloyd-LaFollette Act, was particularly concerned to protect "whistleblowers"—employees threatened with adverse action because they revealed agency mismanagement or abuse. See 5 U.S.C. (Supp. V) 2302(b)(8)(A); H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 386-387 (1978); S. Rep. No. 95-696, 95th Cong., 2d Sess. 8 (1978). The CSRA established the Office of the Special Counsel and empowered it to investigate charges of prohibited personnel practices, including retaliation for whistleblowing or any other violation of an employee's constitutional rights. 5 U.S.C. (Supp. V) 1206. If the Special Counsel finds reasonable grounds to believe that a prohibited personnel practice has occurred, and the agency does not take corrective action, the Special Counsel may initiate a proceeding before the Board to seek such action. 5 U.S.C. (Supp. V) 1206(c)(1)(A) and (B). The Special Counsel also has the authority to initiate disciplinary proceedings before the Board against a manager guilty of a prohibited personnel practice. 5 U.S.C. (Supp. V) 1206(g). The Board may discipline such a manager by ordering "removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000." 5 U.S.C. (Supp. V) 1207(b).[18]

---

[18] Amici Schroeder, *et al.*, urge (Br. 14) that by enacting these protections, Congress revealed its view that previous protections were inadequate, and that the Court should therefore create a *Bivens* remedy for petitioner. But Congress's carefully considered decision to add new protections in 1978 (effective 1979; see Section 907 of the CSRA (92 Stat. 1227)) scarcely suggests that the Court should add new protections effective only at an earlier date. Similarly, the statements in the legislative history that the CSRA

This history reveals that Congress has always assumed responsibility for designing a complete remedial scheme for civil servants. Congress has revisited the remedial scheme frequently, addressing new problems or extending protections to employees it thought it unfair not to cover.

Moreover, it cannot be said that Congress did not intend to design a remedy for constitutional violations like that alleged by petitioner. Civil servants' constitutional rights were at the forefront of Congress's concern; Congress's intent to provide adequate protection for whistleblowers dominates the legislative history of the Lloyd-LaFollette Act, which established the basic structure of civil service remedies in force at the time of petitioner's demotion. Even the Pendleton Act was principally concerned with practices that, today at least, would be held to violate the Constitution—political dismissals and coerced political activity. See *Branti* v. *Finkel*, 445 U.S. 507 (1980); *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). As we explain, and as the congressional amici assert (see page 44, *infra*), Congress has a strong institutional interest in protecting speech of the sort in which petitioner allegedly engaged, and Congress's repeated efforts to perfect the civil service remedies simply do not permit the conclusion that Congress envisioned that courts would consider themselves empowered to create additional remedies.

3. *When Congress Established the Civil Service Remedies, It Assumed that Courts Would Not Play an Active Role in Remedying Federal Employees' Grievances*

A statute is ordinarily presumed not to abrogate existing common law rights or remedies, unless there are clear contrary indications. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976), quoting *Texas*

---

provided "additional" protections for whistleblowers (Schroeder Am. Br. 13) shed no light on what protections were previously afforded; for the reasons we state, *Bivens* actions were not an available remedy before or after the CSRA.

& Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). The Court has suggested that this presumption applies with less force when an act of Congress and federal common law are involved, because of the limited law-making powers of the federal courts. See *City of Milwaukee* v. *Illinois, supra.*

But however strong the presumption, it applies only to "*preexisting* right[s]" (*Texas & Pacific Ry.* v. *Abilene Cotton Oil Co., supra*, 204 U.S. at 437 (emphasis added)); it is "a presumption favoring the retention of long-established and familiar principles" (*Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)). That is because the reason for this principle is that "Congress cannot be presumed to have been unaware of the relevant common-law history" (*City of Milwaukee* v. *Illinois, supra*, 451 U.S. at 337 (Blackmun, J., dissenting)). See also *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974) (repeals by implication are not favored).

In *Carlson* v. *Green, supra*, the FTCA provision offered as a preclusive alternative remedy (28 U.S.C. 2680(h)) was enacted after *Bivens* was decided. By contrast, the statutes establishing petitioner's civil service remedies were enacted before *Bivens*. The presumption should, therefore, be reversed; Congress must have assumed that there was no implied damages remedy.[19] In the "'contemporary legal context'" prevailing when petitioner's civil service remedies were established (*Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203 (May 3, 1982), slip op. 25, quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979)), Congress would have legislated the remedy for a constitutional violation that it considered appropriate. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 272-273 (1979); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978) (limiting the apparent reach of a judicially-

---

[19] See Note, *"Damages or Nothing"—The Efficacy of the Bivens-Type Remedy*, 64 Cornell L. Rev. 667, 667 (1979) (*Bivens* was "a dramatic departure from received law").

created remedy in admiralty because it conflicted with a statute that had been enacted before the remedy was created).

Indeed, until the late 1950's "federal courts were reluctant to play *any* significant role in supervising administrative decisions adverse to federal employees." Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 U. Va. L. Rev. 196, 199 (1973) (emphasis added).[20] The Court has noted this tradition of judicial nonintervention in civil service matters, and its decline. *Sampson* v. *Murray*, *supra*, 415 U.S. at 69-71; *United States* v. *Testan*, *supra*, 424 U.S. at 406. Thus, during the time when most of the civil service remedies available to petitioner were created, the "long-established and familiar principle[]" (*Isbrandtsen Co.* v. *Johnson*, *supra*, 343 U.S. at 783) was that remedies for civil servants' claims—including their constitutional claims—were the province of Congress and the executive branch. When a complex remedial scheme is designed in such a "contemporary legal context," there is plainly no basis for concluding that it envisions, or leaves room for, a judicially created damages remedy. See *Brown* v. *General Services Administration*, *supra*, 425 U.S. at 825-829 (Section 717 is an exclusive remedy in part because when Congress enacted Section 717 it believed, perhaps incorrectly, that there were no other effective remedies for employment discrimination by the federal government). This is particularly true when the statutory remedy created is then subject to Congress's constant superintendence.

---

[20] See, *e.g.*, *Bailey* v. *Richardson*, 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951); *Burnap* v. *United States*, 252 U.S. 512 (1920); *Keim* v. *United States*, 177 U.S. 290 (1900); *White* v. *Berry*, 171 U.S. 366 (1898); *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497 (1840). See generally Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 Colum. L. Rev. 719 (1966); Chaturvedit; *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 Nw. U.L. Rev. 287, 307-330 (1968).

4. *Creating a Personal Damages Remedy in This Context Would Thwart Important Congressional Policies*

As we noted, a remedial scheme must strike a balance among competing objectives. See pages 24-25, *supra*. In some instances—if the principal concern of the statutory scheme is broadly remedial, and the countervailing interests are of lesser importance—a court's creating a remedy that Congress did not intend may do relatively little damage to congressional policies. See, *e.g.*, *Mobil Oil Corp.* v. *Higginbotham*, *supra*; Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195, 1307-1316 (1982). That is not the case here, however. As the court of appeals pointed out (Pet. App. a-9 to a-10), Congress self-consciously balanced the need to protect federal employees' rights against the need to ensure that supervisors are willing to take justified personnel actions, so that the civil service will remain efficient, and Congress attached great importance to the latter interest. Creating a personal damages remedy will severely disturb that balance and harm important interests Congress sought to protect.

As Congress explained, shortly after petitioner brought this suit (S. Rep. No. 95-969, *supra*, at 4): "Throughout this country's history—and especially since [the Pendleton Act of] 1883—there has been a tension between protections established to insure that employees are hired and fired solely on the basis of their ability, and the need of managers and policymakers to have flexibility to perform their jobs." Beginning with the Pendleton Act, Congress and the agencies it empowered to deal with the civil service have undertaken a "task [that] * * * is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons" (*ibid.*). See also H.R. Rep. No. 95-1403, *supra*, at 198; H.R. Rep. No. 1826, 47th Cong., 2d Sess. 1 (1882) (legislative history of the Pendleton Act) (Act designed to "pursue[] a middle course" between "life

tenure of appointees [and] removals at the will of the appointing power").

The problem of striking the proper balance has preoccupied Congress in part because managers in the civil service, in general, have little personal incentive, other than their own sense of duty, to take adverse actions against other employees. See 129 Cong. Rec. H8473 (daily ed. Aug. 11, 1978) (remarks of Rep. Schroeder). A manager's "failure to act probably would not be likely to cause superiors or others to take notice * * * [or] may simply not be visible to his superior or to those in a position to complain" (Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 309). A manager can "find ways to work around unsatisfactory employees, or * * * hope the employees will go elsewhere to work" (S. Rep. No. 95-969, *supra*, at 10).[21] A manager in the position of respondent—who, by virtue of his office, must review a large number of proposed adverse actions, but who generally need not work on a daily basis with the employee involved—has even less of a personal incentive to endorse an adverse action.

Consequently, any system of remedies that places substantial personal burdens on those managers who do take adverse actions gives them a strong incentive not to act. See *Butz* v. *Economou*, 438 U.S. 478, 525 (1978). The result can be serious morale problems and endemic inefficiency. See *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 168 (opinion of Powell, J.). It was a commonplace at the time this suit was brought that civil service appeals were so burdensome to supervisors and agencies that there was little reason for them to act against incompetent or unfit employees; concern with this problem permeates the discussions of civil service reform that led to the 1978 Act. See, *e.g.*, S. Rep. No. 95-969, supra, at 9-10 ("The manager in an appeal may come under severe attack, no mat-

---

[21] Certain provisions of the CSRA were addressed to this problem. See generally 5 U.S.C. (Supp. V) 5401 *et seq.*

ter how fairly the manager has proceeded. Managers embroiled in appeals often find that these processes consume all of their time and attention. Some managers simply avoid taking necessary steps to discipline or discharge employees in the first place."); H.R. Rep. No. 95-1403, *supra*, at 4 (agency that takes disciplinary action "does not benefit because it has to devote costly time to the defense of its action"); *id.* at 101 (President Carter's message on civil service reform); 129 Cong. Rec. H8463 (daily ed. Aug. 11, 1978) (remarks of Rep. Derwinski).

To whatever extent civil service procedures might deter a supervisor from acting, the deterrent effect of a personal damages action is vastly greater. See, *e.g.*, *Owen* v. *City of Independence*, 445 U.S. 622, 653 n.37, 655-656 (1980). "[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty" (*Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 13); consequently, even though an official can raise an immunity defense, he will still know that if he takes an adverse personnel action he risks the psychological and economic burdens of litigation (*ibid.*) and the threat of ruinous personal liability. However remote that threat may seem, living with it for a number of years—this suit, for example, was brought in 1976 and has not yet gone to trial—is debilitating, and the prospect of facing such an ordeal would unquestionably deter many officials from taking justified actions.

It is not an answer that managers will enjoy a qualified immunity. When Congress has not addressed a remedial problem, the courts must strike a rough balance between the protection of rights and the need not to deter official action. See *Butz* v. *Economou*, *supra*, 438 U.S. at 503. The immunity doctrines, derived, like the damages remedy, from judicial traditions (see *Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982), slip op. 12-15) represent such a balance. For the reasons we have given, however, Congress's civil service remedies have struck a different balance—one that does not envision a judicially-created per-

sonal damages remedy, and that reflects the considerable importance Congress attached to preserving managerial flexibility. When "Congress has struck the balance for" the courts (*Mobil Oil Corp.* v. *Higginbotham*, *supra*, 436 U.S. at 623), the courts should not upset that balance.[22]

---

[22] Petitioner urges (Br. 23) that a *Bivens* remedy cannot be precluded unless Congress expressly so states. As we noted, Congress cannot be expected explicitly to preclude a remedy that did not exist at the time the legislation was enacted. Moreover, the Court emphasized the requirement of an explicit statement only in *Davis* v. *Passman*, *supra*, 442 U.S. at 246-247, where the issue was whether Congress had intended to preclude *all* remedies for a constitutional violation. See *Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366 (1953) ("The denial of any remedy is one thing * * *. But the denial of one remedy while another is left open, or the substitution of one for another, is very different."). In *Carlson* v. *Green*, *supra*, the Court specifically stated that the question is not whether Congress has used particular words but simply "whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy" (446 U.S. at 19 n.5).

In any event, the legislative history of the CSRA—the first significant civil service legislation after *Bivens*—contains a clear statement that Congress did not envision *Bivens* actions by federal employees like petitioner. In the course of its consideration of why incompetent civil servants were not removed more easily—a subject that, as we have noted, was a major preoccupation—the Senate Report lists what it considers the principal reasons (S. Rep. No. 95-969, *supra*, at 9-10):

> Performance evaluation procedures do not work well enough to distinguish employees whose performance is below an acceptable level and to make the charges stick.
>
> Fear of employee appeals, grievances and the protracted problems they create for the employee, the manager and the work unit involved.
>
> Natural reluctance on the part of managers to fire an employee, especially when the manager's performance is not directly linked to that of his subordinates.
>
> The lengthy and complex appeals processes adversely affect employees and managers alike. The procedures are so confusing they often discourage the proper exercise of employee rights. The manager in an appeal may come under severe attack, no

In sum, the civil service remedies available to petitioner were a carefully constructed remedial scheme that coordinated the roles of the agency initiating an adverse action, the Civil Service Commission, and the reviewing courts. The development of those remedies shows that Congress superintended and adjusted them, taking responsibility to ensure a complete and equitable remedy. Moreover, Congress did so in a legal context in which courts traditionally had played very little role in remedying grievances arising from the civil service employment relationship. It is clear, therefore, that Congress did not envision that the courts would supplement the civil service remedies with a personal damages action; and for the Court to take such a step now would destroy the careful balance Congress has struck between the rights of employees and the need for managerial flexibility.

---

matter how fairly the manager has proceeded. Managers embroiled in appeals often find that these processes consume all of their time and attention.

President Carter gave essentially the same explanation. See H.R. Rep. No. 95-1403, *supra*, at 2.

It is most unlikely that Congress and the President would not have mentioned the threat of ruinous personal damages suits as a factor inhibiting official action, if they understood such suits to be permitted. Attorney General Bell, at approximately the same time, stated elsewhere that "[d]espite the small odds an employee will actually be held liable in a civil suit, morale within the federal service has suffered as employees have been dragged through drawn-out lawsuits, many of which are frivolous" (Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Leg. 1, 6 (1979)). By not mentioning *Bivens* actions as one of the factors inhibiting managers, the legislative history of the CSRA therefore clearly indicates that Congress assumed such actions could not be brought. To require any more clear a statement than this would have the paradoxical effect of attributing to Congress an intent to permit *Bivens* suits in precisely those contexts in which the unavailability of such relief is widely taken for granted.

We note that amicus curiae National Treasury Employees Union (Br. 22-23 n.12) agrees with us that the legislative history shows that when Congress enacted the CSRA, it assumed federal employees could not bring *Bivens* actions.

C. Special Factors Require the Court To Hesitate Before Creating an Implied Damages Remedy for Federal Employees

The Court ruled in *Bivens* that a damages remedy based directly on the Constitution should not be implied if there are "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. As we explained, this principle recognizes that in certain contexts there may be insufficient reason to infer, from a grant of jurisdiction alone, that Congress intended courts to enforce traditional judicial remedies. See page 17, *supra*.

This is such a context. Although petitioner asserts a constitutional right, his claim to special judicial protection is substantially weaker than that of the other plaintiffs whom the Court has permitted to maintain *Bivens* actions. Moreover, the federal employment relationship has traditions of its own that suggest that courts should not play the role in evaluating employees' grievances that a *Bivens* remedy would compel. These factors may be independently sufficient to preclude a *Bivens* action here; at the very least, they require any doubt about the preclusive effect of the alternative remedy to be resolved against petitioner.

1. *Federal Employees Challenging Adverse Personnel Actions Do Not Have a Strong Claim to Judicial Protection*

Both Justice Harlan in *Bivens* (403 U.S. at 407) and the Court in *Davis* (442 U.S. at 241-242) alluded to the federal courts' historically important role in protecting particularly vulnerable individuals and groups in society. The claimants in *Bivens*, *Davis*, and *Carlson* all arguably belonged to such groups. Petitioner, however, has a substantially weaker claim to the special protection of the courts.

In *Bivens*, federal agents allegedly conducted an illegal and humiliating search and seizure of a person in his

home. In concluding that an implied damages remedy was appropriate, the Court explained that this wrong is distinct from a private trespass, and justifies the creation of a federal judicial remedy, because it involves the exercise of sovereign powers that neither the citizen nor local authorities can effectively resist. 403 U.S. at 394. Consequently, "'[i]n such cases there is no safety for the citizen, except in the protection of the judicial tribunals'" (*id.* at 394-395, quoting *United States* v. *Lee*, 106 U.S. 196, 219 (1882)).[23]

In *Carlson* v. *Green*, the complaint alleged that federal officials denied proper medical care to a prisoner, who was, of course, under the control of the responsible officials. See 446 U.S. at 16 n.1. In both *Carlson* (see *ibid.*) and *Davis*, the alleged wrongs were committed against groups historically subject to discrimination, who are also properly the object of special judicial protection. See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). In addition, had the act complained of in *Davis* been committed by a private party, it would have been illegal. See 42 U.S.C. 2000e-2(a)(1).

Federal employees, by contrast, are not a historically disadvantaged or vulnerable group. *Bivens* itself, in describing special factors that might counsel hesitation, noted that because "Congress [is] normally quite solicitous where the federal purse [is] involved," the Court should be less ready to create a damages remedy in favor of the government when Congress has not acted (403 U.S. at 396, citing *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947)). The civil service, too, is an object of congressional solicitude; in a sense the civil service *is* the government. Congress created the civil service to implement its programs, and it has an interest in maintaining an ef-

---

[23] See also *Pennsylvania* v. *Mimms*, 434 U.S. 106, 122 (1977) (Stevens, J., dissenting); J. Ely, *Democracy and Distrust* 97 (1980) (Fourth Amendment is intended in part to prevent police exercising "low-visibility discretion" from discriminating on the basis of "social station and other [impermissible] factors").

ficient service; both efficiency and morale are impaired when employees are discharged or demoted for improper reasons. As we have shown, this interest has frequently moved Congress to act to protect federal employees.

Nor can it be claimed that employees who criticize their agencies are in special need of judicial protection. The legislative history of both the Lloyd-LaFollette Act and the Civil Service Reform Act of 1978—the two most important pieces of civil service legislation in this century—demonstrate Congress's strong institutional interest in protecting whistleblowers.[24]

Moreover, if petitioner had been privately employed, his demotion for making certain statements would not have been illegal and would have entitled petitioner, at most, to a contractual remedy. Unlike the actions complained of in *Bivens* and *Carlson*, the government's action in this case reflected none of the attributes of sovereignty. As the court of appeals remarked, "[t]he role of the Government as an employer toward its employees is fundamentally different from its role as sovereign over private citizens generally" (Pet. App. a-6 to a-7). In practical terms, the power of the government over petitioner is indistinguishable from the power of a private employer over an employee. The concrete harm to petitioner (see generally *Carey* v. *Piphus*, 435 U.S. 247 (1978)) is no greater than it would have been if a private employer had demoted him for speaking. In noting this, we of course do not intend to question the existence of the well-established constitutional right asserted by petitioner. But petitioner's need for special judicial protection for this right, in the form of a judicially created remedy against an official, would be weak even if fully effective alternative remedies did not exist.

---

[24] The principal theme of the amicus brief in support of petitioner filed by Rep. Schroeder and other members of Congress is precisely that Congress has such a strong institutional interest. See, *e.g.*, Am. Br. 1-2, 17-18.

2. *Disputes Concerning the Federal Employment Relationship Are Properly Addressed, in the First Instance, in a Specialized Administrative Agency, Not a Court*

Federal labor law, in both the public and private sector, reflects a consistent congressional judgment that employment disputes are best resolved, in the first instance, not by a court but by an expert body more closely familiar with the employment relationship. This, too, strongly suggests that the Court should hesitate before creating a remedy that requires a court to resolve employment disputes de novo. See, *e.g.*, *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 461-464 (1974); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); Sunstein, *supra*, 49 U. Chi. L. Rev. at 414.

When Congress first turned its attention to the civil service, in 1883, it created an administrative agency (the Civil Service Commission), carefully required the Commission to be bipartisan, and gave it and the President a broad charter to carry out the purposes of the Pendleton Act. When Congress first established procedural protections for civil servants threatened with dismissal, in the Lloyd-LaFollette Act, it specified agency procedures, not judicial proceedings. When Congress determined to reform the Civil Service, in 1978, it again focused its attention on the administrative agencies involved: it reorganized the Commission's functions, placing them in two new agencies; it specified that one of those agencies, the Merit Systems Protection Board, was to be concerned with the resolution of employment disputes; and it established the Office of the Special Counsel to investigate and act on certain claims of unlawful employment practices. When Congress established penalties for supervisors who violated employees' First Amendment rights or otherwise committed a prohibited personnel practice, it provided for the Special Counsel and the Board to enforce those penalties; it did not empower private parties to seek massive damages recoveries by bringing suit for

punitive damages. See generally *Wren* v. *Merit Systems Protection Board*, 681 F.2d 867 (D.C. Cir. 1982).

This consistent choice of an administrative, not a judicial, forum reflects Congress's determination that expertise and familiarity with the peculiarities of the employment relationship are important to the resolution of employment disputes. See, *e.g.*, *Wathen* v. *United States*, 527 F.2d 1191, 1197-1198 (Ct. Cl. 1975); *Holden* v. *Finch*, 446 F.2d 1311, 1316-1317 (D.C. Cir. 1971).[25] Federal labor law in the private sector, too, reflects the premise that courts are less well suited to resolving employment disputes than persons or agencies that are closer to the situation and more experienced with the nature of employment relationships. Rights under the National Labor Relations Act generally must be asserted not in court initially, but before the National Labor Relations Board, the decisions of which are subject only to limited judicial review; a principal reason for this rule is the Board's expertise and knowledge of industrial relations. See, *e.g.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951). Similarly, a centerpiece of national labor policy is that the decisions of labor arbitrators are entitled to great deference from the courts. See, *e.g.*, *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960) ("The labor arbitrator performs functions which are not normal to the courts;

---

[25] The constitutional standard that petitioner invokes, while of course enforced by courts, is on its face better suited to being applied by a body with expertise about the employment relationship. See *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 414 (1979); *Pickering* v. *Board of Education*, 391 U.S. 563, 570 & n.3 (1968) (First Amendment rights of public employees turn in part on evaluation of threat to "discipline by immediate supervisors or harmony among coworkers" and of nature of working relationship between speaker and supervisor whom he criticizes). See also T. Emerson, *The System of Freedom of Expression* 570 (1970). (In regulating speech of government employees related to their jobs, "the controlling factors are primarily matters of internal management, and the issues must largely be resolved in those terms rather than on free speech considerations.")

the considerations which help him fashion judgments may indeed be foreign to the competence of courts. * * * The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.").

Petitioner and the congressional amici appear to recognize the strength of the tradition that counsels against judicial intrusion into the employment relationship, and the force of the court of appeals' observation that allowing a *Bivens* remedy "might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the government of the opportunity to work out its personnel problems within the framework it has so painstakingly established" (Pet. App. a-10 to a-11). They implicitly acknowledge that the Court would be warranted in at least requiring federal employees to exhaust the civil service remedies before bringing a *Bivens* action. See Pet. Br. 21; Schroeder et al. Am. Br. 9 n.9. We agree that, at a minimum, it would be wholly inappropriate to allow an employee to bring a *Bivens* action without exhausting the "detailed administrative and judicial process designed [by Congress] to provide an opportunity for nonjudicial and nonadversary resolution of claims" (*Great American Federal Savings & Loan Association* v. *Novotny*, 442 U.S. 366, 372-373 (1979)).[26]

---

[26] *Novotny* emphasized the importance of the carefully designed congressional remedy established in Title VII of the Civil Rights Act of 1964, a remedy that must be invoked before a claimant may bring suit (see *Brown* v. *General Services Administration*, *supra*). Title VII is the single major exception to the principle that courts will avoid, if possible, de novo review of complaints arising from the employment relationship. See *Chandler* v. *Roudebush*, 425 U.S. 840 (1976); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973). But the Court has recognized in several contexts that the remedies for employment discrimination are unusually thorough (see, *e.g.*, *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 (1974)) because the eradication of employment discrimination is "a policy that

But even if a claimant exhausts his administrative remedies against the government, review of his claims in a *Bivens* action against an individual official would have to be de novo.[27] Moreover, while Congress could not have intended to allow the civil service remedies to be bypassed, it is also implausible to suppose that Congress intended the redundant and incoherent remedial scheme that petitioner advocates—in which a claimant, having vindicated his personal interests through the civil service remedies by achieving a full measure of compensation (see pages 31-32, *supra*), would be able to bring a separate action for the purpose of imposing punishment on an individual official and gaining a bounty. Petitioner had—and pursued—a remedy that followed the preferred form of initial agency consideration and judicial review, and that provided full compensation. In view of Congress's careful attention to the area, and the many factors counselling judicial restraint, there is no basis for according him an additional, court created, damages remedy.

Congress considered of the highest priority" (*Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)).

[27] Plainly the individual defendant in a *Bivens* action would not be bound by adverse findings of fact made in the administrative proceeding against the government, to which the individual official was not a party. (The claimant might, however, be bound if the agency prevailed in the administrative forum. See *Kremer* v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 399, 421-422 (1966)).

Petitioner and amici assert that *Davis* v. *Passman*, *supra*, precludes any argument that the federal employment relationship gives rise to special factors counselling hesitation. But the plaintiff in *Davis* was a congressional employee, not a civil service employee; the two categories have not traditionally been treated in the same fashion. Moreover, the plaintiff in *Davis* had no other remedy; the Court's choice was therefore between allowing courts to review grievances arising from the employment relationship de novo, on the one hand, and leaving the claimant remediless, on the other. In addition, *Davis* involved employment discrimination of the sort outlawed by Title VII. See page 47 note 26, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

BARBARA L. HERWIG
WENDY M. KEATS
Attorneys

DECEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 393403 1184

Supreme Court, U.S.
FILED
JAN 11 1983
ALEXANDER L. STEVAS
CLERK

NO. 81-469

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,

vs.

WILLIAM R. LUCAS
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

William Harvey Elrod, Jr.,
205 Holly Street, N.E.,
P. O. Box 632,
Decatur, AL 35602
(205) 355-3731.

Counsel for Petitioner.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

ARGUMENT
Congress Has Not Precluded A *Bivens*-Type Remedy In This Case 1

CONCLUSION 7

TABLE OF AUTHORITIES

Statutes

5 U.S.C. (Supp. V.) §1206 ..... 3n

Back Pay Acts of 1948 and 1966 3

Civil Service Reform Act of 1978 ..... 3n, 5n

Pendleton Act (Civil Service Act) of 1883 3

Lloyd-LaFollette Act of 1912 3

Veterans' Preference Act of 1944 3

Cases

Baker v. Carr, 369 U.S. 186 (1962) 6

Bell v. Hood, 327 U.S. 678 (1946) 4n

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Carlson v. Green, 446 U.S. 14 (1980) 4, 4n

Davis v. Passman, 442 U.S. 228 (1979) 4, 6

Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952) 6

NO. 81-469

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,

vs.

WILLIAM R. LUCAS
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

ARGUMENT

Congress Has Not Precluded a *Bivens*-Type Remedy In This Case

The authors of the Brief for the Respondent[1] do not dispute, indeed they penultimately concede, "the existence of the *well-established* constitutional right asserted by . . . [Bush]." (Lucas' Brief, at 44; emphasis ours.) That right, somewhat broadly stated, is the right of a civilian employee

[1]We hereinafter call that brief "Lucas' Brief." We hereinafter call the Petitioner's Opening Brief "Bush's Opening Brief."

of the federal government to be free from abuse and perversion of power in reprisal for the employee's having engaged in free speech.[2] (See ¶¶ 2 through 6, Count Four, Complaint, J.A. 4–7; see, also, Bush's Opening Brief, at 16 and 19.)

While Lucas thus concedes the existence of that right, Lucas nevertheless insists that Bush has no *Bivens*-type remedy against Lucas for the asserted invasion of that right. Lucas insists that Congress has precluded such a remedy against Lucas personally. (Lucas' Brief, 8, 9–10, 17, 28, 41 *et passim*.) Lucas either says or intimates, several times and in several ways, that Congress has interdicted a *Bivens*-type remedy for Bush, and for others similarly situated, in one or both of two ways.

One way that Congress has interdicted a *Bivens*-type against him, Lucas says or intimates (Lucas' Brief, at 6, 8, 9, 14, 17, 20, 23, 24), is by providing specific compensatory remedies, under original delegation to the Civil Service Commission, for what Lucas, with technical accuracy though evasive effect, uniformly calls a "personnel action."[3]

---

[2]More narrowly stated, the right asserted by Bush is the right of a civilian employee of the United States Government to be free from the consequences of a conspiracy to effect his demotion (¶¶ 2 through 6, Count Four, Complaint, J.A. 4-7) as punishment (J.A. 73) for his having "let . . . members of Congress, members of the press, and some few members of the public know of the waste which he observed to be rampant . . . at [the governmental facility where he was employed and which the conspirators managed.]" (¶ 6, Count Four, Complaint, J.A. 7; and, as to the managerial status of the alleged conspirators, please collate the first full paragraph–after the carryover paragraph–at J.A. 14, part of the Lucas affidavit, with the first of the two paragraphs numbered "2" in Count Four of the Complaint, at J.A. 4-5; and see, further, Bush's Opening Brief, at 5-6.)

[3]When neither directly quoting others nor adopting statutory or regulatory terminology, Lucas' counsel describe the putatively remedied "personnel action[s]" as either "unlawful" or "unconstitutional." (Lucas' Brief, at 8.) When either quoting from isolated items of legislative history or employing statutory or regulatory terminology, Lucas' counsel describe those personnel actions as "adverse" (*id.*, at 31, 32, 38); "unjustified" (*id.*, at 32); "unjustified or erroneous" (*id.*); "unjustified

Lucas in effect points to the Pendleton Act of 1883 (*id.*, at 29, 45), the Lloyd-LaFollette Act of 1912 (*id.*, at 18–19, 29, 30, 45), the Veterans' Preference Act of 1944 (*id.*, at 31, and the Back Pay Acts of 1948 and 1966 (*id.*, at 31–32) as milestones along the route by which Congress, either aided or goaded by occasional Presidential action (*id.*, at 29, 30, 31), had provided remedies at wholesale for the Civil Service Commission to dispense at retail prior to the time of the "unlawful personnel action" eventuating in the present suit.

The other way that, as Lucas says or intimates, Congress has precluded a *Bivens*-type action against him by "occupy[ing] the field. . . ." (Lucas' Brief, at 7, 8, 9, 10, 26–28, 34–36 and 39–41.) Lucas evidently would have this Court to infer that the supposedly occupied field embraces *all* remedies, against whomsoever, for constitutional violations consummated under the guise of an adverse personnel action. (*Id.*, at 9, 10, 16, 26, 34–36, 39–41.)

There are, we submit, significant defects in both branches of Lucas' preclusion argument. Nor does the whole of the argument exceed the sum of its parts. Notwithstanding certain somewhat specious strictures of Lucas' counsel (Lucas' Brief, at 8–9, 21–22, 23, 24, 40 n.22), we believe that Part II (pp. 23–29) of Bush's Opening Brief still sufficiently shows that the particular remedies extolled in the Lucas Brief could *not* have been intended to pre-empt a *Bivens*-type remedy in this case.[4] We pass, therefore, to a con-

---

or unwarranted" (*id.*); or, in language taken from the CSRA of *1978*, "prohibited" (*id.*, at 33), citing 5 U.S.C. (Supp. V) [§] 1206.

However described, a personnel action, taken by an agency or officer of the Government, is not the same wrong as, nor should it obscure, let alone insulate, the antecedent wrong of the individual human being or beings who abuse official positions in order to procure the adverse or prohibited action to be taken.

[4]Moreover, the briefs *amici* thoroughly refute Lucas' contention that the civil service remedies pre-empt a *Bivens*-type remedy in the case at bar. See Brief of ACLU, *Amicus Curiae*, at 45-49; Brief of AFL-CIO et al.,

sideration of the broader branch of Lucas' preclusion argument.

In an apparent attempt to avoid *Bivens*, *Davis* and *Carlson* altogether, Lucas argues that the pre-*Bivens* civil service remedies envinced a Congressional intent "to occupy the field in a way . . . [that] felt no room for judicially-*created* remedies." (Lucas' Brief, at 26; emphasis ours.) Initially reading too much into an anachronism,[5] Lucas tenders an extended commentary (*id.*, at 27–41) upon "the structure of the civil service remedies, the presuppositions about the judicial role that existed when they were enacted, and Congress's care in shaping the remedies. . . ." (*Id.*, at 26.) Lucas tenders those topics as "indicia of legislative intent" (*id.*) to occupy the entire field of remedies for whatever deprivations and wrongs might be inflicted, by whom-

---

as Amici Curiae, at 13-16; Brief *Amicus Curiae* of Representatives Patricia Schroeder et al., . . . Members of Congress, and The National Taxpayers Union, at 11-16; and Brief of *Amicus Curiae* National Treasury Employees Union, at 14-23.

[5]Since all but one of the particular statutes invoked, or re-invoked, by Lucas in his chronological development of this branch of his preclusion argument (Lucas' Brief, at 29-32) antedated *Bivens*, Lucas says that "[i]t is . . . pointless to seek an explicit expression of legislative intent to preclude a *Bivens* remedy [in those statutes.]" (*Id.*, at 26.) It is one thing to say, in effect, that it is pointless to assume that Congress in 1883, 1912, 1944, 1948 or 1966 might have foreseen that this Court, in 1971 and in a case styled *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, would render a particular decision—even a decision foreshadowed no later than 1946 in *Bell v. Hood*, 327 U.S. 678. It is quite another thing to say, as Lucas immediately does, that, in enacting the pre-*Bivens* civil service statutes, "Congress had *no reason* to believe that there were any other *possible remedies available to civil servants;* [and that Congress] . . . thus had *no reason* to address the question of whether the remedies it prescribed were exclusive." (*Id.*,; emphasis ours.) The first of the quoted statements may be literally correct. The latter by no means follows: as we hereafter show, there were other than chronological reasons for Congress' failure explicitly to state that it meant for the remedies, if any, which it provided in particular pre-*Bivens* statutes "to be a *substitute* for recovery directly under the Constitution and [that Congress] viewed [such remedies, if any,] as equally effective [as "recovery directly under the Constitution."] (*Carlson v. Green*, 446 U.S. at 18-19.)

soever, upon individual human beings in connection with the victims' work as civilian employees of the United States Government.

As the Court no doubt will observe, only one of those suggested indicia has escaped prior canvassing by Bush and the amici.[6] That one suggested indicium is "the presuppositions about the judicial role that existed. . . ." when Congress enacted the successive civil service statutes.

As an original matter, it may well be doubted that, unless much more thoroughly and authoritatively documented than such mental states usually are, "presuppositions" about institutional roles are trustworthy guides to legislative intent. So far as we have been able to discover, Lucas cites no contemporaneous source disclosing the existence of the postulated presuppositions. Instead, Lucas relies upon after-the-fact observations (Lucas' Brief, at 34—36), made in sundry contexts, to work his way to his truly startling conclusion that, "during the time when most of the civil service remedies available to . . . [Bush] were

[6]For discussion or mention of the structural inadequacies of the civil service remedies to preclude a *Bivens*-type remedy in this case, see Bush's Opening Brief, at 27-29 (sub-paragraphs (d) and (e) of Part II B of the Argument); Brief of the ACLU *Amicus Curiae*, at 47 & n. 12; Brief of AFL-CIO *et al.* as Amici Curiae, at 7 & n. 3; Brief *Amicus Curiae* of Representatives Patricia Schroeder et al. . . ., Members of Congress, and The National Taxpayers Union, at 12; and Brief of Amicus Curiae National Treasury Employees Union. . ., at 16-17, 21 & n. 11.

For observations relating to "Congress's care in shaping the remedies. . . ," see Bush's Opening Brief, at 14 (1st ¶). 17-18 (Part I A 2 of Argument) and, again, 27-28 (sub-paragraphs (d) and (e) of Part II B of the argument); Brief of the ACLU *Amicus Curiae* at 57. ("If Congress, in its 'fine tuning' of civil service remedies, had intended to supplant existing judicial remedies, one would expect to find clear indication of such an intent."); Brief *Amicus Curiae* of Representatives Patricia Schroeder et al. . . ., Members of Congress, and The National Taxpayers Union, 9-10, 12-13; and Brief of Amicus Curiae National Treasury Employees Union, at 21 ("Further evidence of Congress' intent not to displace pre-existing *Bivens* remedies for federal employees is found in the fact that no mention of such intent is contained in the Civil Service Reform Act which was enacted nearly a decade after *Bivens* was decided.")

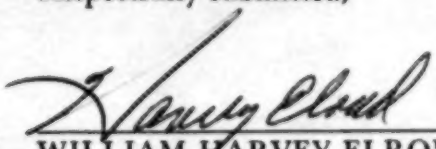
created, the 'long established and familiar principle [. . .]' (*Isbrandtsen Co. v. Johnson*, . . . 343 U.S. at 783) was that remedies for civil servants' claims—*including their constitutional claims*—were the province of Congress and the executive branch." (Lucas' Brief, at 36; emphasis ours.)

Such conclusion, we submit, is so at variance with principle and precedent as to require rejection of the postulated "presupposition" of judicial subordination to legislative will with respect to constitutional questions. "At least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' *Baker v. Carr* . . . [369 U.S.] at 217, we presume that justiciable constitutional rights are to be enforced through the courts." *Davis v. Passman*, 442 U.S. at 242. Lucas has not demonstrated any constitutional commitment to Congress of the issue of whether civilian employees of the federal government are entitled, as other citizens are, to a *Bivens*-type action against federal functionaries who violate constitutional rights of citizens—particularly, admittedly "well-established constitutional right[s] . . ." (Lucas' Brief, at 44.)

CONCLUSION

Notwithstanding Lucas' Brief, the judgment of the court of appeals should be reversed and the case remanded to that court, with directions further to remand the case to the trial court for trial after allowance of time for full discovery.

Respectfully submitted,



WILLIAM HARVEY ELROD, JR.
205 Holly Street, N.E.,
P. O. Box 632,
Decatur, Alabama 35602.
Tel. No. (205) 355-3731.

Attorney for Petitioner.

Office - Supreme Court, U.S.
FILED
SEP 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AND INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS AS AMICI CURIAE

EDWARD J. HICKEY
ERICK GENSER
1125 15th Street, N.W.
Washington, D.C. 20005

JAMES ROSA
MITCHELL NOTIS
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005

DAVID BARR
1899 L Street, N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)

Attorneys for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INDEX

	Page
INTEREST OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	5
1. Background	5
2. Implications of Precluding Federal Employees From Bringing Bivens Actions	6
3. The "Special Factors Counselling Hesitation" Standard	10
4. The "Equally Effective" Alternative Remedy Standard	13
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Arnett v. Kennedy, 416 U.S. 134 8
Bell v. Wolfish, 441 U.S. 520 9
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 ..... *passim*
Brown v. GSA, 425 U.S. 820 15
Butz v. Economou, 438 U.S. 478 ..... 9, 12
Califano v. Sanders, 430 U.S. 99 15
Carlson v. Green, 446 U.S. 14 ..... 2, 3, 4, 5, 6, 7, 9, 10, 13, 14, 16
Chandler v. Roudebush, 425 U.S. 840 15
Cruz v. Beto, 405 U.S. 319 9
Davis v. Passman, 442 U.S. 228 ..... 3, 8, 10, 11, 13
Doe v. Hampton, 556 F.2d 265 (C.A.D.C.) 14
Engineers Public Service Co. v. SEC, 138 F.2d 936 (C.A.D.C.), dismissed as moot, 332 U.S. 788 15
Gravel v. United States, 408 U.S. 606 12
H.L. v. Matheson, 450 U.S. 398 10
Halperin v. Kissinger, 452 U.S. 713 7
Harlow v. Fitzgerald, —— U.S. ——, 50 L.W. 4815 (June 24, 1982) 12
Johnson v. Robison, 415 U.S. 361 15
Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119 9
Meyer v. Nebraska, 262 U.S. 390 10
Nixon v. Fitzgerald, —— U.S. ——, 50 L.W. 4797 (June 24, 1982) 12
Northern Pipeline Co. v. Marathon Pipeline Co., —— U.S. ——, 50 L.W. 4893 15
Oestereich v. Selective Service Board, 393 U.S. 233 15
Parham v. J.R., 442 U.S. 584 10
Pell v. Procunier, 417 U.S. 817 9
Price v. Johnston, 334 U.S. 266 9
Public Utilities Comm'n v. United States, 355 U.S. 534 14
Rinquist v. Hampton, 582 F.2d 1138 (C.A. 7) 14
Tinker v. Des Moines Unified School District, 393 U.S. 503 10

TABLE OF AUTHORITIES—Continued

	Page
Weinberger v. Salfi, 422 U.S. 749	15
Wolff v. McDonnell, 418 U.S. 539	9
Statutes:	
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1135-1144, 5 U.S.C. §§ 7501-7703 (1980)	5
5 U.S.C. § 7501	7
5 U.S.C. § 7502	7
5 U.S.C. § 7503	7
5 U.S.C. § 7511	7
5 U.S.C. § 7512	7
5 U.S.C. § 7513	7
5 U.S.C. § 7531	7
5 U.S.C. § 7532	7
5 U.S.C. § 7701	7
5 U.S.C. § 7702	13
5 U.S.C. § 7703	13
5 U.S.C. § 2302	7
42 U.S.C. § 1983	8
Publ. L. 97-164, Title I, § 144, 96 Stat. 45	14
Miscellaneous:	
Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239 (1955)	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-469

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AND INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS AS AMICI CURIAE

This brief *amici curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations, Public Employee Department, AFL-CIO, American Federation of Government Employees and the International Federation of Professional and Technical Engineers with the consent of the parties as provided for by the Rules of this Court.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations is a federation of 99 national and international unions having a total membership of approximately 14,000,000 working men and women. The Public Employee Department is an association of national and international labor unions that are affiliated with the AFL-CIO and have members employed in the public sector. The American Federation of Government Employees is a labor union representing approximately 700,000 civilian employees of nearly every major department and agency of the federal government. The International Federation of Professional and Technical Engineers is an international union comprised of 73 local unions and 26,000 members throughout the United States and Canada. Of the local unions, 19 are federal employee locals. The international union's affiliates represent, under collective bargaining agreements, some 50,000 employees, 13,000 of whom are in the federal service.

The *amici curiae* seek this opportunity to state their views to the Court because this case will determine whether federal employees, including the employees whom the amici curiae represent, will enjoy a basic right enjoyed by citizens generally—the right of access to the federal courts to redress injuries suffered by reason of actions violative of the plaintiff's constitutional rights.

SUMMARY OF ARGUMENT

1. The question in this case is whether a federal employee who has available administrative means of obtaining reinstatement and backpay for unconstitutional discipline or discharge may bring a damages action against the official or officials responsible for his or her injury. In *Carlson v. Green*, 446 U.S. 14, this Court reaffirmed the

general principle, first established in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, that citizens injured by unconstitutional actions of public officials may bring suit in federal court for damages, unless there are either "special factors counseling hesitation" or a statutory alternate, equally effective remedy specifically intended as a substitute means of redress. *Carlson*, 446 U.S. at 18-19. The court of appeals in this case, on remand from this Court with directions to consider this case in light of *Carlson*, *supra*, held that the federal employment relationship is, without more, a "special factor" precluding a damages suit.

2. The court of appeals' rationale, if accepted, would lead to wide-ranging and anomalous results. Federal employees would have no *Bivens*-type action even where no other means of recourse is available, and even where the official responsible for the unconstitutional action does not have a supervisory relationship with the employee. The constitutional rights of federal employees would be relegated to a less favored status than those not only of citizens generally but of other governmental employees particularly. And, federal employees would be singled out for special treatment as compared with other groups —for example, prisoners, as in *Carlson*, or students, or children generally—as to whom the need for broad governmental discretion has long been recognized, and as to whom particularized rules of substantive constitutional law apply.

3. *Davis v. Passman*, 442 U.S. 228, puts to rest the notion that this Court intended to impose upon federal employees a special disability in vindicating their constitutional rights. *Davis* sanctioned a *Bivens*-type action for sex discrimination in employment by a congressional employee. Obviously, such an action involves the government *qua* employer, and not the government in its gen-

eral sovereign role over private citizens. No sensible distinction can be drawn for present purposes between legislative branch and executive branch employees; indeed, the tradition of broad discretion with regard to employees is considerably stronger for members of Congress than for the executive departments and agencies. And, insofar as the Court of Appeals was relying upon a separation of powers concern, *Davis* indicates that such concerns are to be dealt with through the development of partial and absolute immunities for certain officials and for certain kinds of decisions, rather than through forbidding damages lawsuits in all instances.

4. There remains the possibility that Congress intended to supplant federal employees' *Bivens* actions with an equally effective alternative remedy. But three of the four factors on which the *Carlson* Court relied for its conclusion that the remedy there available was not equivalent to a federal court damages action obtain here as well. And, there is here in addition another problem with the statutory remedy: redress is by an administrative proceeding rather than by plenary federal court action. In the adjudication of constitutional issues, the judiciary, rather than the executive branch, has always been primary. Consequently, absent convincing evidence the view that such a remedy is equally as effective as a full judicial one ought not to be ascribed to Congress.

ARGUMENT

1. *Background.* The petitioner is a federal employee demoted by respondent because of public remarks criticizing the administration of the space flight center headed by respondent. After several years of proceedings, petitioner did succeed in obtaining, through the then-existing Civil Service Regulations,[1] an administrative reversal of his demotion, as well as backpay. In its first opinion in this case, the court of appeals held that, without more, the availability of this means of redressing an adverse personnel action precluded this damages action by petitioner, even though petitioner had alleged that by causing his demotion because of critical statements, respondent violated petitioner's constitutional free speech rights. 598 F.2d 958, 961.

After the court of appeals' first opinion herein, this Court, in *Carlson* v. *Green*, 446 U.S. 14, summarized the principles that govern the availability of a damages remedy in federal court against a federal official when a violation of constitutional rights is alleged:

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S., [388,] 396; *Davis* v. *Passman*, 442 U.S. 228, 245 (1979). The second is

[1] The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1135-1144, 5 U.S.C. §§ 7501-7703 (1980) became effective shortly after the Civil Service Commission's final action upon petitioner's case. While that Act substantially altered the statutory scheme applicable to the discipline or discharge of federal employees, the basic aspects of the former administrative review procedure here pertinent have been preserved. *See* pp. 7-8, *infra*.

> when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens*, *supra*, at 397; *Davis* v. *Passman*, 442 U.S. at 245-247. [*Carlson*, *supra*, 446 U.S. at 18-19.]

This case, then pending upon a petition for a writ of certiorari, was remanded to the Fifth Circuit for reconsideration in light of *Carlson*, *supra*. 446 U.S. 914.

On remand, the court of appeals made no attempt to justify its previous ruling regarding the pertinence of the Civil Service Commission proceedings under the strict criteria *Carlson* established for finding that the existence of an alternative remedial scheme bars a *Bivens*-type court suit against the offending government official or officials. Presumably, that court was quite aware that in terms both of Congressional intent to supplant a *Bivens* action and of the "equally effective" standard, the Civil Service Commission administrative remedy in this case was at least as deficient as the Federal Torts Claims Act possibility in *Carlson*. *See*, part 4, *infra*. Instead, the court of appeals purported to rely on the independent first branch of the *Carlson* analysis—whether there are "special factors counseling hesitation in the absence of affirmative action by Congress" (Pet. App. a-11); there is such a factor, the court below held—"the unique relationship between the Federal Government and its civil service employees" (Pet. App. a-6). Thus, the court of appeals shifted gears in an attempt to preserve its previous decision despite an intervening opinion of this Court.

2. *Implications of Precluding Federal Employees From Bringing Bivens Actions.* Despite the Fifth Circuit's protestations to the contrary (Pet. App. a-11-12), there is no escaping the conclusion that, were that court's rationale approved, federal employees would have no cause of action for damages for constitutional wrongs even in the absence

of an explicit statutory mechanism for redress.[2] To so hold could be of more than abstract importance. Even under the Civil Service Reform Act of 1978 (see n.1, *supra*), only certain types of personnel actions trigger a right to appeal to the Merits Systems Protection Board ("MSPB").[3] *See*, 5 U.S.C. §§ 7511, 7512, 7513, 7701; *compare*, e.g., 5 U.S.C. §§ 7501, 7502, 7503 (no provisions for appeal of suspensions for 14 days or less); 5 U.S.C. §§ 7531, 7532 (decision of head of certain federal agencies is final with respect to suspension and removal deemed "necessary in the interests of national security"; 5 U.S.C. § 7511 (adverse actions against probationary employees are not appealable); 5 U.S.C. § 2302 (specifying "prohibited personnel practices" with regard to personnel actions including appointments, promotions, details, transfers, reassignments, reinstatements, restorations, reemployment

---

[2] The court of appeals suggested that "the result in this case might be different if failure to recognize a *Bivens* remedy would leave Bush . . . without any remedy . . ." Pet. App. a-11-12. This statement, however, melds the two prongs of the *Carlson* analysis into one, contrary to this Court's evident intent: If the result in the case would differ according to whether or not Bush had any other remedy, the decision must rest not on "the unique relationship between the Federal Government and its civil service employees" (Pet. App. a-6), but upon the availability and character of alternative means of redress. Under *Carlson*, however, it is insufficient to defeat a *Bivens* action to show that *some* remedial scheme exists; rather, defendants must "show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 19. Thus, under *Carlson*, the "special factor counselling hesitation" must operate entirely independently of the presence or absence of Congressionally-established remedies. Otherwise, the first prong of the *Carlson* exception becomes simply a device for evading the analytical standards set by the second.

[3] In addition, there is no general statutory protection pertaining to actions against federal employees that do not result in any formal personnel action. For example, wiretapping or warrantless searches might occur without resulting in any specific adverse action. *Cf.*, *Halperin* v. *Kissinger*, 606 F.2d 1192 (C.A.D.C. 1979), aff'd by an equally divided Court, 452 U.S. 713.

and performance evaluation, but providing no right to appeal to MSPB regarding such practices).

Moreover, the court of appeals' rationale is in no way confined to a constitutional damages action against an employee's immediate or remote supervisor, or to cases concerning the sorts of ordinary personnel decisions that such supervisors are routinely called upon to make. Rather, the notion that "the role of the Government as an employer towards its employees is fundamentally different from its role as sovereign over private citizens generally" (Pet. App. a-7), would appear to embrace *any* action by an agent of the federal government against a federal employee, as long as that action is based on the victim's employee status. For example, an official responsible for a government-wide policy subjecting all federal employees to random home searches in order to assure that they are not engaged in any form of illegal activity that would affect their duties would appear to be insulated from answering in damages despite the evident unconstitutionality of such a policy.

Further, the court of appeals' "special circumstances" approach creates of federal employees a class whose constitutional rights are for some reason of lesser significance than those of *other* governmental employees, including those employed by states and municipalities and those who work for members of Congress. For, both of those varieties of governmental employees are entitled to bring damages actions in federal court against officials who treat them in their employment relationship in an unconstitutional manner—subject, of course, to whatever immunity defense may be applicable. *Davis* v. *Passman*, 442 U.S. 228; 42 U.S.C. § 1983. Yet, as a matter of substantive constitutional law, it has never been suggested that the rights of employees, vis-a-vis a governmental employer, differ according to whether that employer is the federal or state government or the legislative or executive branch. *See*, e.g., *Arnett* v. *Kennedy*, 416 U.S. 134, 160 (plurality

opinion); *id.*, at 164 (Powell, J., concurring) (amalgamating First Amendment rights of state and federal employees). And, "[f]ederal officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers . . . To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." *Butz* v. *Economou*, 438 U.S. 478, 501, 504.

Finally, and more generally, the court of appeals' approach to discovering whether there is a "special factor counselling hesitation" is one without principled limit. For example, *Carlson*, *supra*, involved a constitutional damages action by a prisoner. The relationship between the government and a prisoner is also a "unique" one in which the government has long been accorded " 'wide discretion and control.' " Pet. App. a-6-7, quoting *Arnett*, *supra*, 416 U.S. at 168 (Powell, J., concurring). *See*, e.g., *Cruz* v. *Beto*, 405 U.S. 319, 321 ("prison officials must be accorded latitude in the administration of prison affairs"); *Jones* v. *North Carolina Prisoner's Labor Union*, 433 U.S. 119, 122; *Bell* v. *Wolfish*, 441 U.S. 520, 547. Indeed, as a substantive matter, the constitutional protection accorded prisoners has long been narrowly circumscribed, in recognition that criminal conviction and incarceration justify restrictions on privacy, liberty and expression plainly unconstitutional with respect to the populace generally. *See*, e.g., *Price* v. *Johnston*, 334 U.S. 266, 285; *Pell* v. *Procunier*, 417 U.S. 817, 822; *Wolff* v. *McDonnell*, 418 U.S. 539, 555; *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. at 125. The *Carlson* Court, however, did not seize upon the plaintiff's prisoner status as a "special factor" justifying less judicial protection of those substantive constitutional rights that *are* enjoyed by prisoners. Nor did the Court intimate that other classes of individuals who interact with the government in a "unique" way justifying special substantive

constitutional rules—students, for example,[4] or children generally[5]—are to be denied a cause of action in damages against officials who violate those constitutional protections such individuals do enjoy.

3. *The "Special Factors Counselling Hesitation" Standard.* The *Carlson* Court's determination that a plaintiff's prisoner status does not preclude a *Bivens*-type claim indicates that this Court had no intention of authorizing a freewheeling inquiry as to whether the plaintiff's relationship to the government is a "special factor counselling hesitation." Any doubt in this regard is quelled by *Davis* v. *Passman*, *supra*, a case identical to this one with respect to the "special factors" prong of the *Carlson* test.[6]

Davis was a damages action for unconstitutional sex discrimination brought by a Congressional aide against the member of Congress who had employed her. As such, the case did not concern the government in "its role as a sovereign over private citizens generally," but "the role of the Government as an employer toward its employees." Pet. App. a-7. Yet, the *Davis* Court saw nothing about the employment relationship as such to suggest that courts should withhold a cause of action in damages, so that "'the ordinary remedy for an invasion of personal interests in liberty'" (*Davis*, *supra*, 442 U.S. at 245, quoting *Bivens*, *supra*, 403 U.S. at 395) would not lie.

The character of the plaintiff's employment status in *Davis* in no way justifies a less cautious judicial approach than that appropriate here. If anything, the relationship between a member of Congress and his or her rather

---

[4] *See*, e.g., *Tinker* v. *Des Moines Unified School District*, 393 U.S. 503, 507; *Meyer* v. *Nebraska*, 262 U.S. 390, 402.

[5] *See*, e.g., *H. L.* v. *Matheson*, 450 U.S. 398, 411; *Parham* v. *J.R.*, 442 U.S. 584, 602.

[6] *Davis* did differ from this one in that Davis, unlike Bush, had *no* available administrative or judicial means of vindicating in any manner her asserted constitutional right. *But see* n. 2, *supra*.

small staff is likely to be considerably more intimate than that which exists between the chief policy makers and lower-level employees in the executive branch's huge bureaucracy. Indeed, the federal government as an employer is subject to legal restrictions which fill most of one Title of the United States Code (Title 5), while the discretion of Congressional employers with regard to their employees is nearly complete.

It is possible that the court of appeals saw the factor militating against a *Bivens* remedy in the present circumstances as resting at bottom not on the nature of a government employment relationship but upon separation of powers principles. The Fifth Circuit may in other words have been suggesting that there is something untoward about the judicial branch recognizing a damages action affecting the internal affairs of a coordinate branch of our federal government.

Once again, however, *Davis* belies any such concern as one sufficient entirely to preclude a damages action for unconstitutional treatment. In *Davis*, the Court recognized that " 'the respect due coordinate branches of government' " (442 U.S. at 236, n.11, quoting *Baker* v. *Carr*, 369 U.S. 186, 217) does indeed raise "special concerns counselling hesitation" with regard to "a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct" (442 U.S. at 246). *Davis* held, however, (*id.*) that "these concerns are coextensive with the protections afforded by the Speech or Debate Clause:"

> [I]f respondent is not shielded by the Clause, the question whether his dismissal of petitioner violated her Fifth Amendment rights would, as we stated in *Powell* v. *McCormack*, 395 U.S. 486, 548-549 (1969), "require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of respect due [a]

> coordinate branch of government' . . . *Baker* v. *Carr*, 369 U.S. 186 at 217 [442 U.S. at 235-236, n.11.]

There is no constitutional counterpart to the Speech and Debate Clause applicable to executive officials. Obviously, the absence of a " 'textually demonstrable constitutional commitment' [speaking] . . . directly to the separation of powers concerns" (*Davis*, 442 U.S. at 235, n.11, quoting *Baker* v. *Carr*, 369 U.S. at 217), inclines toward *less* judicial hesitation in affording a damages remedy to executive branch employees than in affording that remedy to Congressional aides.

Moreover, in its cases recognizing both partial and absolute immunities from damages for executive branch officials, this Court has sought to protect those officials' independence of action in a manner similar to that afforded members of Congress by the Speech and Debate Clause. *Harlow* v. *Fitzgerald*, —— U.S. ——, 50 L.W. 4815, 4818 (June 24, 1982) (comparing immunity accorded legislative aides under *Gravel* v. *United States*, 408 U.S. 606, with that available to Presidential assistants). Thus, cases such as *Butz* v. *Economou*, 438 U.S. 478, "address how best to reconcile the plaintiff's right to compensation with the need to protect the decision-making processes of an executive department" (*id.* at 503) and, to the extent deemed consistent with appropriate protection for constitutional rights, shield "officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority" (*id.* at 506). *See also Harlow* v. *Fitzgerald*, *supra*, 50 L.W. at 4817, 4819-4820; *Nixon* v. *Fitzgerald*, —— U.S. ——, 50 L.W. 4797, 4801-4804 (June 24, 1982) (President has absolute immunity against damages actions because of "the President's unique office, rooted in the constitutional tradition of the separation of powers").

The *Davis* Court relying directly upon *Butz* concluded that separation of powers concerns are properly dealt with directly, by devising appropriate immunities to assure

independence to the coordinate branches of government, rather than through the blunderbuss surrogate of denying *any* cause of action for damages at all for clearly unconstitutional action:

> If respondent's actions are not shielded by the Clause, we apply the principle that "legislators ought . . . generally to be bound by [the law] as are ordinary persons." *Gravel* v. *United States*, 408 U.S. 606, 615 (1972). Cf. *Doe* v. *McMillan*, 412 U.S. 306, 320 (1973). As *Butz* v. *Economou* stated only last Term:
>
> > "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
> >
> > " 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.' *United States* v. *Lee*, 106 U.S. [196,] 220 [(1882)]." 438 U.S., at 506.
>
> [*Davis*, *supra*, 442 U.S. at 246 footnote omitted; *see also Carlson*, *supra*, 446 U.S. at 25.]

In sum, *Davis* necessarily held that neither the status of being a federal employee nor the solicitude by the judiciary due the internal affairs of the two coordinate branches of the federal government is a "special factor" precluding, without more, a constitutionally based damages action against a governmental official. This being the case, the court of appeals' decision cannot be upheld upon its own rationale.

4. *The "Equally Effective" Alternative Remedy Standard.* There remains the possibility that the result below can be sustained upon the basis of the second prong of the *Carlson* analysis—*viz.*, whether "Congress has provided an alternative remedy which it explicitly declared to be a

substitute for recovery directly under the Constitution and viewed as equally effective" (446 U.S. at 18-19).

We do not address in this brief the full parameters of the "equally effective" remedy issue, for we expect that the parties will do so. We do note, however, that three of the four "additional factors" which in *Carlson* "support[ed] [the] conclusion that Congress did not intend to limit respondent to [a statutory remedy]" (*id.* at 20-21) obtain here as well: As in *Carlson*, the remedy available to petitioner Bush (as well as that accorded federal employees under the Civil Service Reform Act of 1978) poses no threat of damages against an individual and is therefore ineffective as a deterrent; allows no punitive damages; and provides no option of trying the case to a jury.

There is also in this case, as in *Carlson*, an additional factor supporting the conclusion that the statutory remedy was not intended to supplant a *Bivens* action. Id. at 23.[7] That consideration is that except in employment discrimination cases, such remedy as is provided is an administrative one, subject to limited judicial review. 5 U.S.C. §§ 7702, 7703; *see*, for cases under previous statutory scheme, *Doe* v. *Hampton*, 556 F.2d 265 (C.A.D.C.); *Rinquist* v. *Hampton*, 582 F.2d 1138 (C.A. 7).

As a general matter, adjudication of constitutional issues in the federal system has been thought the province of the courts, not administrative agencies.[8] See *Public*

---

[7] In *Carlson*, that factor was that the Federal Torts Claim Act simply adopts the tort law of the state in which the alleged misconduct occurred, rather than providing uniform national rules. 446 U.S. at 23.

[8] As of October 1, 1982, review of MSPB decisions will not be available in the ordinary courts of appeals but only in the new Court of Appeals for the Federal Circuit. Pub. L. 97-164, Title I, § 144, 96 Stat. 45.

Utilities Comm'n. v. *United States*, 355 U.S. 534, 539; *Engineers Public Service Co.* v. *SEC*, 138 F.2d 936, 952-953 (C.A.D.C.), dismissed as moot, 332 U.S. 788; *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 242 (Harlan, J., concurring); *Johnson* v. *Robison*, 415 U.S. 361, 368; Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239, 271-275 (1955); *Weinberger* v. *Salfi*, 422 U.S. 749, 765, 767, *id.* at 794 (Brennan, J. dissenting); *Califano* v. *Sanders*, 430 U.S. 99, 109. Cf. *Northern Pipeline Co.* v. *Marathon Pipeline Co.*, —— U.S.. ——, ——, 50 L.W. 4893, 4901 (plurality opinion). Congress outlined the reasons for this traditional assignment of responsibilities when it declined to commit the determination of employment discrimination cases, public or private, to a federal agency:

> Determination of [constitutional issues] deserves and requires non-partisan judgment. This judgment is best afforded by Federal Court judges who, shielded from political influence by life tenure, are more likely to withstand political pressure and render their decision in a climate tempered by judicial reflection and supported by historical judicial independence. [*Chandler* v. *Roudebush*, 425 U.S. 840, 851, quoting S. Rep. No. 85, 92nd Cong., 1st Sess.][9] *See also Davis, supra*, 442 U.S. at 241-242.

Given the inadequacies this statutory remedy shares with that available in *Carlson* and the additional fact that it makes an administrative agency the original adjudicator of constitutional issues, it is no more likely that Congress

---

[9] *Chandler* held that federal employees are entitled under Title VII as amended in 1972 to a trial *de novo* of all employment discrimination claims, despite the availability of internal administrative remedies. For this reason, *Brown* v. *GSA*, 425 U.S. 820, decided the same day as *Chandler* and holding that Title VII remedies for federal government employment discrimination cases are exclusive, is in no way inconsistent with our position in this case, even if *Brown* is read to preclude a *Bivens*-type remedy for discrimination.

"viewed as equally effective" as a *Bivens* suit (*Carlson*, *supra*, 446 U.S. at 19) the remedy available to Bush than that it took such a view of the nonuniform qualified traditional remedy available in *Carlson*. At least this Court should not so conclude in the absence of convincing evidence in statutory language or legislative history.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

EDWARD J. HICKEY
ERICK GENSER
1125 15th Street, N.W.
Washington, D.C. 20005

JAMES ROSA
MITCHELL NOTIS
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005

DAVID BARR
1899 L Street, N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)

Attorneys for Amici Curiae

No. 81-469

FILED
SEP 11 [redacted]
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,
v.
WILLIAM R. LUCAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

CHARLES B. WAYNE
STEVEN SARFATTI
Counsel of Record
2828 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20007
(202) 965-7910

MARK H. LYNCH
American Civil Liberties
Union Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5388

September 11, 1982

QUESTION PRESENTED

Whether a federal employee may be denied the right to maintain a Bivens action against his superiors to redress the violation of his First Amendment right to free speech.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.	i
TABLE OF AUTHORITIES.	iv
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT.	11
UNDER THE CRITERIA OF CARLSON V. GREEN, FEDERAL EMPLOYEES ARE ENTITLED TO PURSUE BIVENS ACTIONS TO REDRESS VIOLATIONS OF THEIR CONSTITUTIONAL RIGHT TO FREE SPEECH.	11
I. No "Special Factors" Warrant Defeating the Right of Federal Employees to Pursue a Bivens Action	14
A. The Court of Appeals Misconceived this Court's Formulation of the "Special Factors" Standard. . .	14
B. The Administrative Remedies Available to Federal Employees Are Not a "Special Factor".	21
C. The Status of Federal Employees Is Not a "Special Factor".	26

Page

D. The Nature of the Substantive Right at Stake in this Case -- the First Amendment Right to Free Speech -- Is Not a Special Factor. 39

II. Congress Has Passed No Law Depriving Federal Employees of the Bivens Cause of Action . . . 45

A. The Fullest Measure of Administrative Relief Cannot Substitute for a Bivens Remedy 47

B. Congress Has Not Provided a Remedy that It Has "Explicitly Declared Be a Substitute" for a Bivens Action. 56

CONCLUSION. 59

TABLE OF AUTHORITIES

Cases	Page
Arnett v. Kennedy, 416 U.S. 134 (1974).	30
Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).	passim
Bush v. Lucas, 647 F.2d 573, cert. granted, 102 S. Ct. 3481 (1982). . .	passim
Butz v. Economou, 438 U.S. 478 (1978).	passim
California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974).	45
Carlson v. Green, 446 U.S. 14 (1980) .	passim
Carey v. Piphus, 435 U.S. 247 (1978) .	49, 50
City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).	53
Davis v. Passman, 442 U.S. 228 (1979).	passim
Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970).	49
Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). . .	43
Fitzgerald v. Hampton, 383 F. Supp. 823 (D.D.C. 1974).	44
Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), aff'd by an equally divided court, 453 U.S. 928 (1981)	49, 50

Page

Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982). . . . . passim

In re Robert J. Frazier, MSPB Order No. SCC-80-1 (1979). 47

Kovacs v. Cooper, 336 U.S. 77 (1949) . 50

McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). . 31

McGrain v. Daugherty, 273 U.S. 135 (1927) 43

Monell v. Dept. of Social Servs. of New York, 436 U.S. 658 (1978). . . . 34

New York Times Co. v. Sullivan, 376 U.S. 254 (1964). 41

Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982) 17

Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 102 S. Ct. 2858 (1982). 55

Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975) 49

Perry v. Sindermann, 408 U.S. 593 (1972) 31

Pickering v. Board of Education, 391 U.S. 563 (1968). 9, 39, 42

Sampson v. Murray, 415 U.S. 61 (1974). 30

Scheuer v. Rhodes, 416 U.S. 232 (1974) 35, 36

Page

Sonntag v. Dooley, 650 F.2d 904 (7th Cir. 1981). 22

Tatum v. Morton, 562 F.2d 1279 (D.C. Cir. 1977) 51

Statutes

Civil Service Reform Act of 1978 . . . 22, 46, 47

5 U.S.C. § 1206(c)(1)(B) 47

5 U.S.C. § 2302(b)(8)(A) 47

Other Authorities

68 American Bar Association Journal 1065 (Sept. 1982). 52

Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, Hearings Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. (1978). 43

D. Dobbs, Handbook on the Law of Remedies (1973). 50

T. Emerson, The System of Freedom of Expression (1970) 44

INTEREST OF AMICUS CURIAE [1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to the protection of the civil rights and liberties of Americans. Since its founding in 1920, one of the constant concerns of the ACLU has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally-protected rights. Among the most important of those mechanisms is a cause of action for damages against those federal officials who violate the constitutional rights of their fellow citizens. The decision below would deny this customary and necessary remedy to the three million Americans who work for the federal government. The ACLU submits this

---

1/ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

brief amicus curiae, in support of petitioner, to urge the Court to preserve the damage remedy for federal employees who are deprived of their constitutional rights.

STATEMENT OF THE CASE

Petitioner, William C. Bush, is an aerospace engineer who is employed as a career civil servant by the National Aeronautics and Space Administration at the Marshall Space Flight Center in Alabama. During the course of a personnel reorganization in 1974, the Center's management assigned petitioner to a new position. Petitioner voiced objections to the reassignment through agency channels, stating that the position to which he had been assigned lacked any duties of consequence. He appealed the reassignment to the Civil Service Commission ("CSC"), and, during the pendency of the appeal, spoke out concerning the lack of productive work in

the new position and the apparent misuse and waste of federal funds.

In June, 1975, after the reporting of petitioner's views in the media, respondent, the Director of the Center, stated during a press conference that he had ordered an investigation of petitioner's statements and that they had no basis in fact. Less than two months later, a personnel action was initiated against petitioner. Respondent, charged with decision-making authority in such matters, reduced petitioner in grade from GS-14 to GS-12. Petitioner appealed this decision to the CSC and was ultimately restored to his former grade and awarded back pay.

Prior to this favorable decision, petitioner had filed suit in state court, claiming, inter alia, that respondent had conspired with others to demote petitioner in retaliation for the exercise of his First

Amendment rights. Respondent removed the case to the United States District Court for the Northern District of Alabama, and moved for summary judgment. The district court granted the motion [2] and the court of appeals affirmed. [3] Petitioner then filed a petition for a writ of certiorari in this Court. Bush v. Lucas, No. 79-1044. The Court summarily granted the petition, vacated the court of appeals' decision, and remanded the case for further consideration in light of Carlson v. Green, 446 U.S. 14 (1980). 446 U.S. 914 (1980).

On remand, the court of appeals reaffirmed the prior summary judgment in favor of respondent, finding that this Court's decision in Carlson did not require a dif-

---

2/ Appendix D to Petition for Writ of Certiorari.

3/ Appendix C to Petition for Writ of Certiorari (reported at 598 F.2d 958 (5th Cir. 1979)).

ferent result. Appendix A to Petition for Writ of Certiorari [hereinafter cited as Pet. App.]. 4/ Petitioner again filed a petition for a writ of certiorari, which was granted by this Court on June 28, 1982. 102 S. Ct. 3481.

SUMMARY OF ARGUMENT

The decision below contravenes the principles laid down in Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and Carlson v. Green, 446 U.S. 14 (1980). In those cases, this Court established that citizens victimized by federal officials' unconstitutional acts are presumed to have an action for damages against those officials. Such an action can be defeated only when defendants

---

4/ The court of appeals decision is reported at 647 F.2d 573 (5th Cir. 1981).

(1) demonstrate "special factors counselling hesitation" against a damage action or (2) show that Congress has provided an alternative, "equally effective" remedy that it intended to substitute for a Bivens action. Neither of the exceptions is present here.

The relationship between the federal government and its employees does not constitute a "special factor" that defeats petitioner's right to maintain a Bivens action. In finding this relationship to be a bar to suit, the court of appeals misconceived this Court's narrow formulation of the "special factors" standard. The Court's decisions make clear that a damage remedy is not to be defeated simply because there exists a countervailing governmental interest or a perceived tension between vindication of constitutional rights and governmental objectives. Only in extraordinary cases raising an irreconcilable clash between personal

accountability and functions textually committed under the Constitution to particular federal officers is there a need for a complete bar to suit.

Even if the decision below had applied the proper "special factors" standard, the court of appeals erred in finding "special factors" present in this case. None of the three considerations identified below can serve as a basis for denying federal employees the right to maintain a damage action to redress constitutional violations. First, the administrative remedies available to federal employees cannot be a "special factor" because they are properly considered only under the second branch of the Carlson test as an "alternative remedy." The remedies in question fail to qualify under that second branch, and must not be permitted to masquerade as a "special factor" under the first part of the Carlson formulation.

Second, the status of federal employees in no way detracts from their entitlement to maintain Bivens actions. There is nothing about the relationship between federal officers and their subordinates that justifies closing the courthouse doors to the approximately three million citizens in federal service. The government's interest in efficiently managing its personnel can be safeguarded through the less severe means of affording defendants qualified immunity or by firmly applying the rules of procedure to cull out insubstantial lawsuits at the threshold. The court of appeals decision effectively revives the long-discredited view that public employment is a "privilege" that limits the ordinary rights of a citizen. It also creates an unprincipled distinction between the remedies available to

federal employees and those available to state and local employees under 42 U.S.C. § 1983 and to employees of the legislative branch under Davis v. Passman, 442 U.S. 228 (1979).

Finally, the nature of the substantive right here at issue -- the First Amendment right to free speech -- is not a "special factor." The balancing of public employees' First Amendment rights mandated by the Pickering decision is no different in principle from that called for in the Court's other First Amendment cases. If the nature of First Amendment rights is at all relevant, their pre-eminent stature is an element that weighs in favor of confirming the Bivens cause of action for federal employees.

Nor can the government carry its burden under the second branch of the Carlson test, for Congress has enacted no "equally effective" alternative statutory remedy to

preempt the Bivens action. In Carlson, this Court found the Bivens action more effective than the Federal Tort Claims Act remedy because of four factors: Bivens' deterrent effect, the availability of punitive damages, the right to trial by jury, and uniformity of standards for vindicating constitutional rights. The instant case has these same factors and adds one, the availability of compensatory damages. The enormous disparity between the relief afforded by a Bivens action and that provided under civil service statutes explains the government's failure to identify any indication of intent on the part of Congress -- or even discussion of the issue -- to preempt the Bivens action for federal employees.

ARGUMENT

UNDER THE CRITERIA OF CARLSON V. GREEN, FEDERAL EMPLOYEES ARE ENTITLED TO PURSUE BIVENS ACTIONS TO REDRESS VIOLATIONS OF THEIR CONSTITUTIONAL RIGHT TO FREE SPEECH.

This Court has declared that victims of federal officials' unconstitutional acts are presumed to have a cause of action for damages against those officials arising directly under the Constitution. Carlson v. Green, 446 U.S. 14, 18 (1980); Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). This traditional means of securing redress for constitutional violations can only be defeated when (1) "defendants demonstrate 'special factors counselling hesitation in absence of affirmative action by Congress'"; or (2) "defendants show that Congress has provided an alternative remedy

which it explicitly declared to be a substitute for recovery directly under the Constitution, and viewed as equally effective." Carlson, 446 U.S. at 18 (emphasis in original). Neither of the exceptions is present here.

The court of appeals, after remand by this Court, determined that a Bivens remedy should be denied to petitioner and other federal employees like him because of the existence of "special factors." These "special factors" identified by the court were (1) the administrative remedies provided for the contesting of personnel decisions; (2) the nature of the relationship between the federal government and its employees; and (3) the character of the First Amendment rights of government employees. Pet. App. a-6 to a-12.

As set forth below, the court erred in so finding, for no "special factors" exist that warrant extinguishing the right of federal employees to the Bivens cause of action. Although the court of appeals did not reach the question of whether Congress provided an alternative, equally effective remedy, the government argued below that the administrative remedies provided federal employees are a "substitute" for a Bivens remedy and have been so declared by Congress. See Supplemental Brief for Appellee, Bush v. Lucas, No. 77-1615 (5th Cir.) at 34-38 [hereinafter cited as Supp. Br.]. This argument is without merit, for the remedies urged by the government can in no way compare with a Bivens action.

I. No "Special Factors" Warrant Defeating the Right of Federal Employees to Pursue a Bivens Action.

A. The Court of Appeals Misconceived this Court's Formulation of the "Special Factors" Standard.

In refusing to recognize a Bivens cause of action in favor of federal employees, the court of appeals grounded its decision on the availability of alternative remedies to contest wrongful personnel actions, on the wide discretion traditionally afforded to the government in handling its own personnel matters, and on limitations placed on the First Amendment rights of public employees. Pet. App. a-6 to a-12. In the court's view, the relationship between the federal government and its employees is so fragile and highly regulated that it would be unduly impaired by affording injured civil servants a right of action to remedy constitutional violations committed by their superiors. As

set forth below, this analysis misconceives the narrow formulation of the "special factors" standard laid down by this Court.

At the outset, it must be recognized that the consequences of finding "special factors" are draconian. Such a finding interposes a complete bar to a civil suit for damages and confers on federal officials the equivalent of absolute immunity. It extinguishes the complainant's right of action and closes off access to the courts in every case even "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights . . . ." Harlow v. Fitzgerald, 102 S. Ct. 2727, 2739 (1982).

Mindful of the severity of finding "special factors," this Court has articulated a standard that reserves "special factors" for truly extraordinary cases where the mere

threat of litigation and personal accountability would impinge upon the constitutional prerogatives of officials in coordinate branches of government. This approach was made clear in Davis v. Passman, 442 U.S. 228 (1979), in which the Court held that even members of Congress are liable in damages for actions taken in the course of their work, provided that the conduct falls outside the protections of the "speech and debate" clause. Id. at 228. Likewise, the decision in Carlson rejected the "special factors" argument of federal officers who lacked "independent status in our constitutional scheme." 446 U.S. at 19. This was so even though "requiring them to defend the respondent's suit might inhibit efforts to perform their official duties . . . . " Id.

These decisions make clear that the traditional remedy of damages for constitutional violations is not to be defeated simply because there is a countervailing government interest. They reflect the Court's considered judgment that the "special factors" test is to be used only in the cases demonstrating irreconcilable incompatibility between the prospect of damage suits and the performance of official responsibilities entrusted under the Constitution to functionaries in the coordinate branches. Cf. Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982). The rationale is that only in such cases is there a need for a complete, threshold bar to suit. On the other hand, where the constitutional prerogatives of government officials can be safeguarded by affording them qualified immunity for discretionary acts, as in Carlson, or by granting protection under the speech and debate

clause for legislative acts, as in Davis, there is no justification for denying access to the courthouse to injured persons seeking redress for invasions of their constitutional liberties. Cf. Harlow v. Fitzgerald, supra.

Tne "special factors" identified in the decision below are very different from those identified in Bivens, Davis, and Carlson. The court of appeals focused on civil service remedies, the high degree of oversight and control that characterizes the employer-employee relationship in federal service, and the circumscribed nature of government employees' First Amendment rights. But those are not the sort of "special factors" recognized in this Court's decisions. Indeed, the court of appeals nowhere undertook to determine whether any of these considerations evidenced an unresolvable clash between civil liability and due respect for the constitutional prerogatives of officials in the

coordinate branches that could not be accommodated through an appropriate degree of official immunity.

Nor could the court of appeals have properly reached such a determination. If anything, the availability of incomplete administrative remedies, the high degree of control that federal officers exercise over their subordinates, and the established right of government employees to speak out on issues of public concern weigh strongly in favor of, not against, the recognition of a damage action to vindicate constitutional rights.

Moreover, acceptance of the court of appeals' loose formulation of "special factors" would trivialize the importance of damage actions in achieving compensation for the violation of constitutional rights and in deterring future unconstitutional misconduct. According to the court of appeals, the doors of the courthouse can be shut to

injured federal employees whenever a court perceives that there is a tension between governmental objectives and personal accountability. This is so even though the government's interests can be safeguarded by the less drastic means of affording defendants qualified immunity or by firmly applying the rules of procedure in a manner calculated to cull out insubstantial lawsuits at the threshold. See Harlow, supra, 102 S. Ct. at 2736-38; Butz v. Economou, 438 U.S. 478, 507-08 (1978). The court of appeals' formulation radically reworks the balance struck by this Court and jeopardizes the right of citizens to redress violations of their fundamental liberties.

In any event, even if the decision below had accepted the "special factors" standard set forth in Davis and Carlson, the court of appeals erred in finding "special factors" present in this case. As shown below, none

of the considerations identified by the court supports a judgment that the right of citizens to pursue an action for damages for the invasion of their constitutional liberties should be denied to federal employees. The court of appeals' decision exaggerates the conflict between personal accountability and the accomplishment of governmental objectives, and should be rejected.

B. The Administrative Remedies Available to Federal Employees Are Not a "Special Factor."

The court of appeals found that the administrative remedies available to federal employees constitute a "special factor" that prevents them from seeking relief for the invasion of their constitutional rights through a Bivens cause of action. Pet. App. a-8 to a-11. The remedies identified by the court include provisions from several statutory schemes, including the Lloyd-La Follette Act,

the Back Pay Acts of 1948 and 1966, and the Civil Service Reform Act of 1978. Id. at a-9. The difficulty with such an approach, however, is that it reviews congressional enactments under an inappropriate portion of the Carlson test. Carlson makes clear that courts are to review actions of Congress under the "alternative remedy" branch of the test. 446 U.S. at 18-19. The other branch, "special factors counselling hesitation," as demonstrated above, comes into play only in the event that a Bivens cause of action will interfere with constitutional prerogatives. See Sonntag v. Dooley, 650 F.2d 904, 907 (7th Cir. 1981).

By confusing the two branches of the test, the court of appeals rendered ineffective this Court's carefully delineated formulation concerning the circumstances under which the existence of a statutory remedy may warrant the pre-emption of an otherwise

available Bivens cause of action -- i.e., only when a defendant demonstrates that the remedy in issue is equally effective as a Bivens action and Congress has explicitly declared the remedy to be a "substitute" for a Bivens action. 446 U.S. at 18-19. Consideration of a statutory remedial scheme under the "special factors" branch is directly contrary to the teaching of Carlson.

Even if the statutory remedies in issue could somehow be considered under the "special factors" analysis, those remedies plainly do not satisfy its requirements. First, the statutory remedies in no way meet the requirements of the "alternative remedy" branch of the Carlson test. See pp. 45-56 infra. It would defy logic to conclude that a statutory remedy that does not qualify as a congressionally-mandated substitute for a Bivens action could nevertheless achieve the same effect by masquerading as a "special factor" under the other part of the Carlson formulation.

Second, the court of appeals' concern as to the relationship between the statutory and Bivens remedies centered on the possibility that the option of a Bivens remedy "might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief . . . ." Pet. App. a-10. The court of appeals' fear is unfounded because the two remedies serve very different functions, provide different forms of relief, and are directed against different defendants. A Bivens action, brought against individual federal officials for money damages, cannot reinstate a wrongfully discharged employee or restore an aggrieved employee like petitioner to a formerly-held grade. Only pursuit of the administrative remedy, where the agency itself is a party, can furnish such relief. The two remedies are

neither equivalent nor duplicative, 5/ and may have to be jointly pursued to obtain complete relief. 6/

Finally, the court of appeals perceived that confirmation of federal employees' right

---

5/ Of course, the out-of-pocket loss component of an employee's Bivens damages may include back pay, which is also available under the statutory remedy. This common element in no way renders the two remedies identical. A court or agency need only guard against double recovery.

6/ A close cousin to the "bypass" argument is the possibility that an avalanche of lawsuits, many of them frivolous, will result if the Bivens remedy for federal employees is confirmed. But constitutional rights are the cornerstone of our system of government; a citizen who claims a violation of those rights should not be turned away from the courthouse door solely because of a scarcity of judicial resources. "[B]udgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles." Bivens, 403 U.S. at 411. (Harlan, J., concurring).

Moreover, the Court's decisions in Butz, supra, and Harlow, supra, make clear that insubstantial claims should and can be dealt with at the threshold through application of the rules of civil procedure. 438 U.S. at 507-08; 102 S. Ct. at 2736-38.

to a Bivens action "would [ultimately] provide a disincentive for Congress to continue improving the mechanisms by which an aggrieved employee can protect his rights." Pet. App. at a-11. If this conjectured disincentive on the part of Congress were allowed to defeat a Bivens action, no Bivens action would ever be permitted where Congress has provided a partial, inadequate remedy. Indeed, Congress' failure to act is a basis for confirming a plaintiff's right to bring a Bivens action, not a basis for defeating that right. Should Congress wish to substitute another remedy for a Bivens remedy in a particular setting, it need only provide a true substitute and so declare its intent. Carlson, 446 U.S. at 18-19.

C. The Status of Federal Employees Is Not a "Special Factor."

Just as the existence of partial administrative remedies does not defeat the right of civil servants to recover damages for the

violation of the First Amendment right to free speech, so, too, their status as federal employees does not detract from their entitlement to pursue Bivens actions. The imperatives of federal service in no way diminish the responsibility of federal officials to observe the constitutional rights of their subordinates, and no consideration of efficiency in the administration of federal programs mandates that they be relieved of personal accountability for unconstitutional misconduct. The court of appeals' opposite conclusion misconceives the character and realities of federal employment and must be rejected.

Underlying the decision below is the view that there is something "fundamentally different" about the relationship between government supervisors and their subordinates, Pet. App. at a-6 to a-7, and that, on account of this difference, civil servants should be

denied the opportunity, already available to their state counterparts and even to fellow employees of the legislative branch, to recover damages for the invasion of their constitutional freedoms. To be sure, the efficient performance of government functions entails the oversight and direction of public servants to a degree significantly different than the government's relations with private citizens. But there is nothing about the federal government's relationship with its employees that renders their constitutional rights less worthy of protection than those of the rest of the public. As this Court observed in Butz, "we see no substantial basis for holding, as the United States would have us do, that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the United States Constitution . . . ."

438 U.S. at 507. This observation should apply to federal officials' conduct toward their subordinates as well as toward the public at large.

If anything, the need for safeguarding constitutional rights is that much more compelling in the case of civil servants. The very degree of dependence and control that distinguishes the employer-employee relation from the government stance towards the public places employees in greater jeopardy of loss of constitutional freedoms at the hands of overbearing federal officers. "Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale." Butz, 438 U.S. at 506.

The court of appeals' answer to the heightened threat of injury faced by federal employees is to disregard it altogether and to take refuge in the government's "traditional" role of exercising the "widest latitude in the 'dispatch of its own internal affairs.'" Pet. App. at a-7. The court of appeals, citing Sampson v. Murray, 415 U.S. 61, 83 (1974) and Arnett v. Kennedy, 416 U.S. 134, 155 (1974), cases that have nothing to do with the availability of a cause of action for remedying the violation of substantive constitutional protections, treated this "tradition" as one empowering the government to override the exercise of these freedoms by persons in federal service and as one that commands the courts to give rigid deference to the government's chosen means of handling personnel matters. According to the court of appeals, affording federal employees access to the courts and the op-

portunity to recover damages from their superiors for unconstitutional conduct poses too great a threat to the government's need for autonomy in regulating federal employment.

In this regard, the court of appeals' view harks back to a bygone era when government service was relegated to the status of a "privilege" subject to limiting conditions and the suspension of ordinary rights of citizens. See, e.g., McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892) (Holmes, J.). An unbroken chain of later cases has disavowed this "traditional" view of public employment. See, e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972) and cases cited therein. Indeed, these cases establish that the traditional role of government in regulating public service is one of respect for, not disregard of, constitutional liberties.

The Court's decision in Davis v. Passman is especially instructive. That case presented the question of whether Congress' traditional autonomy over its internal affairs counselled against providing a Bivens action for an injured congressional employee. Even though Davis implicated significant separation of powers considerations not present in the case of suits by civil servants, the Court upheld the employee's right to pursue a damage remedy, recognizing that "a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counselling hesitation . . . ." Id. at 246.

The decision below also conflicts with other "traditions" about how citizens may go about redressing constitutional wrongs. Bivens, Butz, and Davis all are rooted in the view that ours is a system where "'[n]o officer of the law may set the law at defiance with impunity'"; 7/

7/ Butz, 438 U.S. at 506; Davis, 442 U.S. at 246.

where "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury'"; [8/] and where "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." [9/] The court of appeals decision ignores this time-honored tradition and, in the name of self-regulation of federal employment, closes the courthouse doors to federal employees seeking to establish personal accountability for the invasion of their most fundamental liberties.

Moreover, the right to pursue a damage action is one that this Court has jealously safeguarded for employees of state government.

8/ Bivens, 403 U.S. at 397; Davis, 442 U.S. at 242.

9/ Bivens, 403 U.S. at 395; Davis, 442 U.S. at 245.

See, e.g., Monell v. Dept. of Social Servs. of New York, 436 U.S. 658 (1978). In Butz, the Court stressed that the standards of liability of federal officials for unconstitutional conduct should not deviate from those applicable to "state officials when sued for the identical violation under [42 U.S.C.] § 1983. . . . Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers." 438 U.S. at 500-01 (emphasis in original). Yet acceptance of the court of appeals' conclusion gives federal officers dealing with their subordinates an absolute immunity from liability that is not shared by their state counterparts.

The same kind of anomaly results from singling out federal employees from private citizens injured by the unconstitutional misconduct of federal officials. Read together, Bivens, Butz, and Carlson confirm

that in conducting the business of government, federal officers owe a duty, enforceable by an action for damages, to observe the constitutional rights of members of the public. The effect of the court of appeals' approach, however, is to skewer this requirement of obedience to the law and to afford federal officers an absolute shield from liability for actions relating to their subordinates and a qualified immunity for actions taken in relation to other citizens.

Contrary to the decision below, this kind of disparity cannot be validated on the ground that Bivens actions will impair the efficient administration of federal programs. In Butz, the Court concluded that "Scheuer [v. Rhodes, 416 U.S. 232 (1974)], and other cases have recognized that . . . insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." 438 U.S.

at 506-07. The Court noted that Scheuer held that the broad scope of official responsibility and the necessity of acting decisively in performing essential government functions -- the very factors emphasized in the decision below -- do not justify erecting an absolute bar to suits seeking redress for constitutional deprivations. Id. That same reasoning applies here. Federal officers no more require absolute protection for the exercise of their discretion over personnel matters than they do for conducting the remainder of the business of government.

The suggestion that individual accountability will lead to functional paralysis has a demonstrably hollow ring. The court of appeals offered no empirical support for this time-worn rationalization. If the theory had any force, the operations of state government (since Scheuer), federal agencies (since Butz), and congressional offices (since Davis) would

have been crippled. The absence of any evidence of harm to governmental interests belies this cry of wolf. 10/

In any event, the governmental interest in recruiting and retaining qualified managers and in assuring that these individuals have the freedom of action they need to conduct internal government affairs does not warrant a blanket exemption from personal accountability. In Butz, the Court resolved this very question in favor of individual responsibility, holding that qualified immunity offered adequate protection to "officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." 438 U.S. at 506.

10/ Even if there was "evidence" demonstrating a tension between effective administration and respect for constitutional rights, the loss in efficiency is not too dear a price to pay to assure obedience to this nation's fundamental laws.

The government's interests received even greater solicitude in Harlow's reformulation of the qualified immunity standard. In Harlow, the Court reiterated its view that "qualified immunity [offered] the best attainable accommodation of competing values," 102 S. Ct. at 2736, and adjusted the standard to insure that federal officials are shielded from the rigors of trial and liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 2737. This reformulation of the qualified immunity test provides ample protection for the resolute exercise of official discretion. This is true whether the discretion relates to actions affecting the public at large or, as in the instant case, to internal agency matters. The court of appeals' opposite conclusion overturns this Court's careful resolution of the discretion issue and elevates

the government's need for autonomy in conducting its own affairs to heights never before recognized in the decisions of this Court.

D. The Nature of the Substantive Right at Stake in this Case -- the First Amendment Right to Free Speech -- Is Not a Special Factor.

The final "special factor" identified in the decision below is that the nature of the substantive right here at stake, the First Amendment right of civil servants to speak out on public issues, requires that petitioner's Bivens remedy be defeated. Pet. App. a-7 to a-8. In so finding, the court of appeals relied on Pickering v. Board of Education, 391 U.S. 563 (1968), where this Court held that in regard to the free speech right of government employees, a balance must be struck between the interest of the employee in the exercise of those rights,

and "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568. The decision below reflects the view that the nature of federal employees' right to free speech and the balancing process used in determining the character of that right constitutes a "special factor." This conclusion is without merit.

The decisions of this Court, in a wide variety of settings, make clear that First Amendment rights are subject to elaborate balancing of competing interests. The balancing analysis used in employee cases like Pickering is no different in principle from that called for by the Court's other First Amendment cases. Thus, the fact that speech of federal employees like petitioner is subject to a weighing of competing interests is not "special," and cannot justify the side-

stepping of judicial resolution of fundamental constitutional issues.

Indeed, if the character of First Amendment rights has any relevance in the analysis to be undertaken by this Court, it must be as an element weighing in favor of confirming petitioner's Bivens cause of action. Safeguarding the right to free speech on the part of federal employees is critical to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). The public's interest in First Amendment contributions by federal employees far outweighs any advantages that might be gained by affording executive officials a blanket exemption from personal accountability for their abuses of power. It does so for three reasons.

First, federal employees are an important source of information for the public at large about the operations of government. In Pickering, where a public school teacher spoke out concerning the operation and funding of the school system that employed him, this Court found that

> [o]n such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Id. at 571-72.

The same is true for federal employees, for they often possess knowledge about the workings of government unavailable to the general public. Their information is no less "vital to informed decisionmaking."

Second, federal employees can make a significant contribution to effective congressional oversight of executive functions. As this Court has recognized, the ability of Congress to discharge its duties is directly related to the quality of information made available to Congress. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975); McGrain v. Daugherty, 273 U.S. 135, 175 (1927). Federal employees who speak out thus "provide valuable assistance to Congress in its fulfillment of its oversight responsibilities." See Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, Hearings Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 857 (statement of Senator Ribicoff).

Third, the public statements of civil servants can be critical to the efficiency of the executive branch itself:

> [F]reedom of expression on the part of government employees can play an important role in counteracting those stultifying forces which customarily pervade bureaucracy. Organizational pressures toward dullness and conformity in the public service can perhaps be partly overcome by establishing firm principles that encourage, or at least protect, diversity in opinion and discussion.

T. Emerson, The System of Freedom of Expression 564 (1970).

Furthermore, when actions taken in retaliation against one federal employee who speaks out go unredressed, the chilling effect on others' exercise of the right to free speech is severe. Fitzgerald v. Hampton, 383 F. Supp. 823, 825 (D.D.C. 1974). The same is true if it is perceived that the available statutory remedies offer inadequate protection or relief to employees who are willing to put conscience over career and speak out on issues of public concern. The availability of a Bivens action serves to preserve and promote free, open speech and debate on national issues among federal employees who all too frequently are confronted with this unenviable choice. Far from being a

"special factor" that would defeat the damage remedy, the right to free speech speaks most strongly in favor of such a remedy.

II. Congress Has Passed No Law Depriving Federal Employees of the Bivens Cause of Action.

In its supplemental brief filed on remand to the court of appeals, the government argued that there is in fact a statutory scheme that fulfills the second part of the Carlson test and preempts the Bivens action that would otherwise be available to petitioner. 11/ That scheme is said to emerge from various provisions of the Lloyd-La Follette Act, as amended; the Veterans Preference Acts of 1944 and 1948; Executive Orders No. 10988 and 11491 (1962); and the Back Pay Act of 1966. See

---

11/ Although the court of appeals did not reach this argument, the government may nevertheless use it to defend the decision below, California Bankers Ass'n v. Schultz, 416 U.S. 21, 71 (1974), and will likely do so.

Supp. Br. at 34. The government finds additional support for its position in the Civil Service Reform Act of 1978 ("CSRA"). Supp. Br. at 19-26, 34 n.12. Although the CSRA was not effective at the time of respondent's demotion of petitioner, the government argues that the CSRA was comprehensive legislation that essentially continued the remedies that were available to petitioner under prior law, id. at 21, and, therefore, was relevant to congressional intent as to the availability of a Bivens action. Id. at 34 n.12.

Try as it may, however, the government cannot, as required by Carlson, carry the burden of demonstrating that Congress "provided an alternative remedy which is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 18-19 (emphasis in original). The remedial scheme on which it relies is in no way comparable, much less "equally effective," to a Bivens cause of action.

A. The Fullest Measure of Administrative Relief Cannot Substitute for a Bivens Remedy.

Under the procedures in effect at the time of petitioner's demotion, the full extent of petitioner's statutory remedies were "specific notice and review procedures," reinstatement to his former grade, and back pay. 12/ Pet. App. a-9. This administrative relief pales beside remedies available through a Bivens cause of action. The Carlson Court cited four factors that supported

---

12/ Petitioner did in fact pursue these remedies and was reinstated to his former grade with pay. Id. Had the CSRA governed petitioner's rights, he would have been entitled to no greater relief. Under the provisions of the CSRA, respondent's action taken against petitioner, as alleged, constituted a "prohibited personnel practice." See 5 U.S.C. § 2302(b)(8)(A). A "prohibited personnel practice" is to be remedied by "corrective action." See id. § 1206(c)(1)(B). Although the parameters of "corrective action" are not clear, reinstatement and back pay are available remedies. See In re Robert J. Frazier, MSPB Order No. SCC-80-1 (1979). The CSRA does not authorize money damages of any sort and the government does not claim that such damages are available under the statute.

the conclusion that the Bivens remedy is more effective than the remedy available under the Federal Tort Claims Act ("FTCA"), the statute under consideration in Carlson. These four factors are Bivens' deterrent effect, the availability of punitive damages, the right to trial by jury, and uniformity of standards for vindicating constitutional rights. 446 U.S. at 20-23. The case before the Court adds one significant, additional factor, the availability of compensatory damages. 13/

Compensatory Damages. Unlike the FTCA in Carlson, the statutory scheme applicable to federal employees makes no provision whatever for compensatory damages for the harm suffered, other than the limited back pay

---

13/ No one difference between the Bivens remedy and the statutory remedy under scrutiny "need independently render the [statutory remedy] inadequate. It can fail to be equally effective on the cumulative basis of more than one difference." Carlson, 446 U.S. at 22 n.10.

remedy. Under this scheme, even civil servants who prevail in administrative proceedings cannot be made whole. But when constitutional rights are violated, compensation is appropriate for any harm suffered, intangible injury as well as out-of-pocket loss. Halperin v. Kissinger, 606 F.2d 1192, 1207 (D.C. Cir. 1979), aff'd by an equally divided court, 453 U.S. 928 (1981) (Fourth Amendment Bivens action); Paton v. La Prade, 524 F.2d 862, 870-72 (3d Cir. 1975) (First Amendment Bivens action); Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970) (action brought under 42 U.S.C. § 1983). In cases such as this one, a plaintiff may be able to recover substantial compensatory damages beyond back pay for the pain and suffering endured through the abusive actions of superiors. 14/

14/ The question of compensation of intangible injury is, of course, distinct from the issue that concerned this Court in Carey v. Piphus, 435 U.S. 247 (1978). Carey held that in the absence of proof of actual injury, a plaintiff (continued on next page)

Moreover, when the violation giving rise to damages is one of the right to free speech, that right's "preferred position" in the hierarchy of constitutional freedoms, Kovacs v. Cooper, 336 U.S. 77, 88 (1949), forbids a grudging approach in the assessment of such damages:

> The vindication of [First Amendment] rights warrants more than token acknowledgement . . . . Compensatory damages embrace more than recompense for monetary injury . . . as is evident from amounts for pain, suffering and humiliation. Compensation for denial of First Amendment rights should not be extravagant . . . . [but] should not be approached in a niggardly spirit. It is in the pub-

---

(footnote continued)
alleging violation of due process rights may receive only nominal damages. Id. at 264-67. Intangible injuries are, of course, no less "actual" than out-of-pocket loss; they merely require different methods of proof. See generally D. Dobbs, Handbook on the Law of Remedies § 8.1, at 544-51 (1973) (measurement of pain and suffering damages). Carey also differs from the instant case in that it concerned procedural rights rather than the substantive right at stake here. See Halperin, supra, 606 F.2d at 1207 n.100.

> lic interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right . . . .

Tatum v. Morton, 562 F.2d 1279, 1282 (D.C. Cir. 1977). See id. at 1286-87 (Wilkey, J., concurring).

The statutory remedy claimed by the government to be "equally effective" to the Bivens remedy is lacking this critical element of compensation.

Bivens' Deterrent Effect. In Carlson, this Court stated that "[i]t is almost axiomatic that the threat of damages has a deterrent effect, . . . surely particularly so when the individual official faces personal liability." 446 U.S. at 21. This observation reflects the common sense view that accountability is the strongest motivator for government officials. A Bivens remedy serves this objective, whereas the statutory scheme relied on by the government does not.

The government argued below that supervisory federal personnel are sufficiently deterred from committing unconstitutional acts by (a) a desire to avoid scrutiny of their "management decisions" by their superiors, and (b) the disciplinary sanctions provided by the CSRA through the Merit Systems Protection Board ("MSPB") and its investigatory arm, the Office of Special Counsel. Supp. Br. at 37 n.15. The first factor cannot be seriously regarded, for Congress, in creating the MSPB and its Special Counsel, obviously thought that the mere desire on the part of a supervisor for career advancement was not sufficient protection for those employees under his control. In regard to the Special Counsel, the performance of that office has to date been seriously deficient. 15/ When

---

15/ In three and one-half years of operation, the Special Counsel "has yet to win a case before the [MSPB] establishing that a whistle blower's rights have been violated." 68 A.B.A. J. 1065 (Sept. 1982).

prosecution is unlikely or incompetent, lawless conduct is encouraged, not deterred.

Punitive Damages. The Court stated in Carlson that punitive damages are available in a "proper" 42 U.S.C. § 1983 action and that culpable federal officials should face the same liability as their state government counterparts. 446 U.S. at 21-22. Thus, the statutory prohibition of punitive damages in an FTCA suit renders that remedy "that much less effective than a Bivens action as a deterrent to unconstitutional acts." Id. at 23. Indeed, a remedial scheme that permits "juries and courts to assess punitive damages in appropriate circumstances against the offending official based on his personal finances, . . . directly advances the public's interest in preventing repeated constitutional deprivations." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269 (1981). By

contrast, the statutory remedies available to injured civil servants lack provisions authorizing punitive damages, and a Bivens action is therefore necessary to insure deterrence.

Jury Trial Option. Like the FTCA in Carlson, id. at 22-23, the statutory remedies urged by the government do not offer the opportunity to choose a jury trial. As in Carlson, this factor weighs against any contention that the statutory remedies here at issue can substitute for a Bivens remedy.

Uniformity of Standards for Vindicating Constitutional Rights. The Carlson Court found a Bivens action preferable to an FTCA suit because, in part, the Constitution would be the yardstick by which federal officials' conduct would be measured, rather than "the vagaries of the laws of the several States." Id. at 23. This precise issue of uniformity is not present in this case. Constitutional standards should apply regardless of whether

federal employees are left to their statutory remedies or are permitted to maintain Bivens actions. But what is at issue is who will apply constitutional standards to the claims of such employees. The choice is between federal district judges and administrative hearing officers, and it is the former who routinely adjudicate constitutional questions. Moreover, federal judges' primacy in the area is beyond question. As this Court stated in Davis, 442 U.S. at 241, "[t]he judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced."

In addition, federal judges are insulated by Article III's tenure and salary provisions, 16/ but administrative hearing officers have neither of those critical protections. Indepen-

---

16/ See generally Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2864-66 (1982).

dent district judges are clearly to be preferred over federal employees at the mercy of their superiors and the political winds.

The likelihood of uniform and faithful application of constitutional standards is consequently greater when the federal judiciary, rather than administrative personnel, is considering claims of injury.

B. Congress Has Not Provided a Remedy that It Has "Explicitly Declared to Be a Substitute" for a Bivens Action.

In light of the wide disparity between a Bivens action and the administrative remedies in issue, it is not surprising that the government, like the Carlson defendant, can "point to nothing in the [statutory scheme] or its legislative history to show that Congress meant to preempt a Bivens remedy or create an equally effective remedy for constitutional violations." 446 U.S. at 19. The government's inability

to do so is a telling admission because in comprehensively reforming the civil service laws in 1978, Congress did not pre-empt the well-established Bivens remedy. If Congress, in its "fine tuning" of civil service remedies, [17] had intended to supplant existing judicial remedies, one would expect to find clear indication of such an intent. The absence of any congressional consideration is dispositive in petitioner's favor because "[s]uch silence is far from 'the clearly discernible will of Congress,'" Davis, 442 U.S. at 247, that Carlson requires to extinguish the Bivens cause of action.

Before the court of appeals on remand, the government sought to mask its failure to carry the required burden by standing the Carlson test on its head. The government ad-

---

17/ See Pet. App. a-9.

vanced an interpretation of Carlson that would defeat a Bivens cause of action unless explicit statutory provisions or legislative history evidenced a congressional intent to preserve an action for damages. Judged under that interpretation, the government contends, there is no Bivens cause of action for federal employees because there is no "language preserving a Bivens remedy in the civil service statutes and regulations, nor in the legislative history." Supp. Br. at 36.

Less fidelity for the standard laid down in Carlson is difficult to imagine. The government does not apply the Carlson test -- the need for an adequate substitute and an explicit congressional declaration that a substitute for Bivens is provided -- but concocts one of its own: A Bivens action is only available if, when Congress legislates in the general area, it specifically declares support for the existing judicial remedy. This approach

is directly opposite to the Carlson holding, which requires defendants to demonstrate that Congress deliberately intended to extinguish the pre-existing Bivens remedy in favor of a substitute, equally effective statutory remedy. This the government cannot do.

CONCLUSION

The decision of the court of appeals should be reversed and the summary judgment vacated, and this case should be remanded to the district court for further proceedings on the merits of petitioner's claims.

Respectfully submitted,

CHARLES B. WAYNE
STEVEN SARFATTI
Counsel of Record
2828 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20007
(202) 965-7910

MARK H. LYNCH
American Civil Liberties
Union Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5380

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-469

IN THE

Supreme Court of the United States

October Term, 1982

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF PETITIONER BUSH

Robert M. Tobias
General Counsel

John F. Bufe
Deputy General Counsel

Lois G. Williams
Associate General Counsel

Michael David Fox
Assistant Counsel

National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
(202) 785-4411

THE CAPITOLLAS PRESS, INC. — 1717 K Street N.W. — Washington, D.C. — 223-1220

QUESTIONS PRESENTED

1. Whether the federal employment relationship is a "special factor" militating against an implied right of action for damages against federal officials who have intentionally violated the constitutional rights of federal employees.

2. Whether the civil service remedies available to federal employees for violations of their rights under federal employment statutes are alternative remedies for *constitutional* violations which Congress has explicitly declared to be a substitute for a *Bivens* remedy and which Congress viewed as equally effective.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

QUESTIONS PRESENTED i

INTEREST OF NTEU AS *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. FEDERAL EMPLOYEES WHO HAVE BEEN RETALIATED AGAINST FOR THE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS MAY VINDICATE THOSE RIGHTS IN AN ACTION FOR DAMAGES AGAINST THE OFFENDING FEDERAL OFFICIAL 4

A. Introduction 4

B. In refusing to infer a constitutional cause of action for federal employees, the court below incorrectly applied the rule of *Bivens*, as reiterated in *Davis v. Passman* and *Carlson v. Green*. 6

C. The federal employment relationship is not a "special factor" militating against an implied right of action for damages against an offending federal official. 9

D. The civil service remedies available to federal employees for violations of their rights under federal employment statutes are not alternative remedies which Congress has explicitly declared to be substitutes for recovery directly under the Constitution and which Congress viewed as equally effective 14

Page

E. Neither government efficiency nor scarce judicial resources will be compromised by allowing federal employees to vindicate their constitutional rights in damage actions, since the qualified immunity doctrine will prevent suit in all but the most egregious instances of intentional invasion of clear constitutional rights. 24

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Page**

Alexander v. Gardner-Denver Co.,
415 U.S. 36, 50 (1974) 17

Alfred Knopf Co. v. Colby,
509 F.2d 1362 (4th Cir. 1975) *cert. denied*
421 U.S. 992 (1975) 9

Arnett v. Kennedy,
416 U.S. 134 (1974) 9

Bell v. Hood,
327 U.S. 678 (1946) 6

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics
403 U.S. 388 (1971) 2, 5, 6, 7, 8, 11, 13, 16, 18, 19, 21, 24, 26, 29

Branti v. Finkel,
445 U.S. 507 (1980) 10

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 9

Brown v. General Services Administration,
425 U.S. 820 (1976) 23, 24

Bush v. Lucas,
647 F.2d 573 (5th Cir. 1981) 4, 5, 7, 8, 9, 10, 11, 15, 24, 28, 29

Butz v. Economou, 438 U.S. 478 (1978) 12, 20, 24, 26, 27

Carey v. Piphus, 435 U.S. 247 (1978) 20

Carlson v. Green, 446 U.S. 14 (1980) 5, 6, 7, 8, 12, 15, 16, 18 19, 20, 21, 22, 24

Davis v. Passman, 442 U.S. 228 (1979) 5, 6, 8, 12, 16, 19, 24

Elrod v. Burns, 427 U.S. 347 (1976) 10

Page

Feres v. United States, 340 U.S. 135 (1950) 13

Harlow v. Fitzgerald,
50 U.S.L.W. 4815 (June 22, 1982) 12, 25, 26, 27

Jaffee v. United States,
663 F.2d 1226 (3rd Cir. 1981) 13

Kannisto v. City of San Francisco,
541, F.2d 841 (9th Cir. 1976) *cert. denied*
430 U.S. 931 (1977) 13

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 10

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 6

McAnaw v. Custis,
No. 81-4137 (D.Kan., Jan. 15, 1982) 6

Paton v. La Prade,
524 F.2d 862 (3rd Cir. 1975) 6

Pickering v. Board of Education,
391 U.S. 563 (1968) 10, 11,

Rostker v. Goldberg, 448 U.S. 1306 (1981) 13

Scheuer v. Rhodes, 416 U.S. 232 (1974) 26

Simpson v. Weeks,
570 F.2d 240 (10th Cir. 1978) *cert. denied*
443 U.S. 911 (1979) 13

Sonntag v. Dooley,
650 F.2d 904 (7th Cir. 1981) 6

Stencel Aero Engineering Corp. v. United States,
431 U.S. 666 (1977) 13

United Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) 5, 9, 10, 11

Page

United Public Workers v. Mitchell,
330 U.S. 75 (1947) 9

United States v. Snepp,
444 U.S. 507 (1980) 9, 13

United States v. Standard Oil,
332 U.S. 301 (1947) 12

Wieman v. Updegraff, 344 U.S. 183 (1952) 9

Wood v. Strickland, 420 U.S. 308 (1975) 27

Wren v. Merit Systems Protection Board,
681 F.2d 867 (D.C. Cir. 1982) 17

Constitution, Statutes and Regulations

United States Constitution, First Amendment ..... *passim*

Civil Service Reform Act of 1978 (92 Stat. III) 19, 21

5 U.S.C. 1205 19
5 U.S.C. 1206(a)(1) 19
5 U.S.C. 1206(c) 19
5 U.S.C. 2301 *et seq.* 19, 21
5 U.S.C. 2302(b)(8) 19
5 U.S.C. 5596 19
5 U.S.C. 7701 19
5 C.F.R. 1.1 *et seq.* 19
5 C.F.R. 550. 801-807 19

Legislative History

House Report, H.R. Rep. No. 1403,
95th Cong., 2d Sess. 386 (1978) *reprinted in*
Legislative History of the Civil Service Reform
Act of 1978 760 ..... 22, 23

Page

H. Rep. No. 95-1403, 95th Cong., 2d Sess. 3 (1978) *reprinted in* I House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Civil Service Reform Act of 1978* at 640 (1979) 22

II *Legislative History of the Civil Sevice Reform Act of 1978* at 1607, 1633, 1680, 1725 22

Miscellaneous

"Schroeder Calls for Abolition of MSPB Office of Special Counsel," 964 GERR 51 (May 5, 1982) 17

Sinzinger, "Liberties for Some," *Federal Times*, Vol. 17, No. 40, p. 2, col. 2 (November 30, 1981)..... 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-469

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF PETITIONER BUSH

THE INTEREST OF NTEU AS AMICUS CURIAE

The National Treasury Employees Union ("NTEU") is a labor organization representing the interests of federal employees. NTEU has been certified pursuant to the provisions of 5 U.S.C. §§ 7111, 7135(a)(1) as the exclusive bargaining representative of over 120,000 federal employees in various bargaining units, including the Internal Revenue Service, the Customs Service, the Department of Energy, the Federal Communications Commission, the Federal Elections Commission, the Federal Deposit Insurance Corporation, the Bureau of Alcohol, Tobacco, and Firearms the Bureau of Public Debt, the Department of Health and Human Services, the Bureau of Government Financial Obligations, and the Pension Benefit Guaranty Corporation.

NTEU employs a legal staff of approximately forty (40) lawyers who specialize in federal employment issues. For many years, NTEU has vigorously litigated its rights as an organization and the rights of the employees NTEU represents, as well as the rights of all federal employees, *e.g., Parks et al. v. Internal Revenue Service, et al.,* 618 F.2d 677 (10th Cir. 1980) (illegal disclosure of personnel records); *National Treasury Employees Union v. Campbell,* 589 F.2d 669 D.C. Cir. 1978) (excessive health insurance rates for federal employees); *National Treasury Employees Union v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974) (illegal withholding of employee pay raises).

NTEU files this brief as *amicus curiae* because of the significant impact the Court's decision will have on the ability of all federal employees to protect their constitutional rights in a meaningful fashion. The Fifth Circuit has ruled that Bush, solely because he is a federal employee, cannot sue the federal official who has intentionally violated his First Amendment right to free speech. Should this Court allow that decision to stand, the fundamental liberties of all federal employees will be less secure and more susceptible to intentional abuse.

For these reasons, NTEU and its members have a substantial interest in the outcome of this controversy. Both the petitioner, through his attorney, and the respondent, through the Solicitor General, have consented to the filing of NTEU's brief in this case.

SUMMARY OF ARGUMENT

The lower court reached an erroneous result in this case because it misinterpreted and misapplied the principles of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and its progeny. Although the lower court held the federal employment

relationship to be a "special factor" counseling hesitation in allowing a *Bivens* remedy, its decision relied almost exclusively on the assumed availability of statutory civil service remedies as an alternative to a *Bivens* action. The court below thus merged the two distinct limitations on *Bivens* actions established by this Court, one pertaining to "special factors" and the other pertaining to statutory alternatives, into a single, hybrid limitation in which a statute may constitute a "special factor." As a result, the court below applied a significantly less demanding standard of adequacy to those statutory alternatives than this Court has required when the constitutional liberties vindicated by a *Bivens* remedy are at stake.

The federal employment relationship is not a "special factor counseling hesitation," as this Court has applied that term. Nor can it be said that Congress has provided an alternative remedy for *constitutional* violations which it explicitly meant to be a substitute for a *Bivens* cause of action and which it viewed as equally effective. Congress has made no such explicit, or even implicit, declaration; and it cannot be maintained, in light of this Court's decisions, that any civil service remedy is as effective, as a means of either redress or deterrence, as a *Bivens* remedy against individual wrongdoers. Moreover, the burden of showing special factors or congressional intent to preempt a *Bivens* cause of action has been squarely placed by this Court on the shoulders of those who would avoid liability. It is a burden which cannot be met in this case, since no such special factors or congressional intent exists. Further, the lower court failed to recognize that the doctrine of "qualified immunity" would adequately protect the government's interest in efficiency and permit federal employees to seek damages only in genuinely egregious cases of intentional, malicious violations of their constitutional rights.

The principles established by this Court support a *Bivens* cause of action against federal officials who have intentionally invaded the constitutional rights of federal employees. Indeed, those principles do more than merely support such a cause of action, they compel it. None of the limitations on *Bivens* actions articulated by this Court apply to shield federal officials from liability for intentional attacks upon the constitutional rights of federal employees.

The end product of the lower court's errors is the determination that federal employees, alone among all citizens, are prohibited from seeking damages from officials who have intentionally violated their constitutional rights. This Court cannot, consistent with its own decisions, permit that determination to become a part of our fundamental law. For all of the above reasons, the decision of the lower court must be reversed.

ARGUMENT

I. FEDERAL EMPLOYEES WHO HAVE BEEN RETALIATED AGAINST FOR THE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS MAY VINDICATE THOSE RIGHTS IN AN ACTION FOR DAMAGES AGAINST THE OFFENDING OFFICIAL.

A. Introduction

On remand from this Court, the Fifth Circuit, for the second time, has refused to recognize a *Bivens* remedy for a federal employee seeking damages from a superior federal official for violating his First Amendment rights. The court below grounded this result in its holding that the employer-employee relationship in the federal government is a "special factor" which counsels against recognizing a constitutional cause of action. *Bush v. Lucas,* 647 F.2d 573 (1981). It is that employment relationship, said the

court, which distinguishes the instant case from the decisions of this Court holding that citizens may seek damages against government officials who trespass upon their constitutional rights, e.g., *Carlson v. Green,* 446 U.S. 14 (1980); *Davis v. Passman,* 442 U.S. 228 (1979); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

The National Treasury Employees Union, as *amicus curiae,* respectfully submits that the court below erred in holding that federal employees, solely by virtue of their employment status, stand on a different footing from other citizens when seeking recompense for constitutional violations by federal officials. It is true that under the decisions of this Court the speech rights protected by the First Amendment are more limited for federal employees than for other citizens. *See e.g., United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973). Nevertheless, there is no justification in either law or reason for imposing a further disability on federal employees who are punished for expression which clearly falls within the realm of constitutionally protected speech.[1]

---

[1]We understand the issue presented here to be whether a federal employee may seek damages for a clear violation of his First Amendments rights, and *not* whether the speech engaged in is protected in the first instance by the First Amendment. This case was disposed of below on defendant's motion for summary judgment. *Bush v. Lucas, supra,* 647 F.2d at 575. The defendant did not argue, and the lower court did not hold, that Bush's speech lay outside the protection of the Constitution. Instead, the lower court assumed the existence of Bush's substantive rights under the First Amendment, but held that the public employer-employee relationship affects "the way in which an *aggrieved* employee can assert and redress his rights in the employment context," *Id.* at 576 (emphasis added).

B. In Refusing To Infer A Constitutional Cause Of Action For Federal Employees, The Court Below Incorrectly Applied The Rule Of *Bivens*, As Reiterated In *Davis v. Passman* and *Carlson v. Green*.

In its seminal decision in *Bivens*, 403 U.S. 388 (1971), this Court recognized an implied constitutional cause of action for damages against federal agents for the infringement of personal liberty guaranteed by the Constitution. Although *Bivens* was the first case which explicitly affirmed the existence of a damage action against federal officials for constitutional torts, the Court noted that such damage actions have deep roots in this nation's jurisprudence. *Id.* at 392, 395-396; *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-180 (1803). These roots were also reflected in the Court's determination that money damages is the appropriate remedy for injuries to rights protected by the Constitution. *Bivens, supra*, 403 U.S. at 395-396.

Bivens concerned the violation of rights secured by the Fourth Amendment. In the years since *Bivens*, however, this Court has recognized implied causes of action under other constitutional provisions which secure our fundamental liberties from governmental abuse. *Davis v. Passman*, 442 U.S. 228, 245-249 (1979) (Fifth Amendment); *Carlson v. Green*, 446 U.S. 14, 17 (1980) (Eighth Amendment). The lower federal courts have similarly recognized implied causes of action to vindicate a broad range of constitutional rights. *Paton v. La Prade*, 524 F.2d 862 (3rd Cir. 1975) (Fourteenth and First Amendments); *Sonntag v. Dooley*, 650 F.2d 904 (7th Cir. 1981) (First Amendment); *McAnaw v. Custis*, (D. Kan. Jan. 15,

1982) (unreported) (First Amendment). It is thus clearly established "that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green, supra,* 446 U.S. at 18.

Since *Bivens,* no decision of this Court has failed to recognize the right to a damage action by one whose constitutional rights have been intentionally violated by a federal official. In *Bivens* and its progeny, however, this Court has established two limitations on the implication of such damage actions for constitutional torts. The first of these limitations applies when the defendants can show the existence of "special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens, supra,* 403 U.S. at 396; *Davis v. Passman, supra,* 442 U.S. at 245: *Carlson v. Green, supra,* 446 U.S. at 18, 19. The second limitation applies "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* (emphasis the Court's). Unless a defendant can show that one of these two limitations applies, the victim of a constitutional infringement by a federal official will be able to redress the injury in damages, a "remedial mechanism normally available in the federal courts." *Davis v. Passman, supra,* 442 U.S. at 248, *quoting Bivens, supra,* 403 U.S. at 397. Neither of these limitations applies in this case.

The court below purported to reach only the "special factors" limitation on *Bivens* actions.[2] It held that "the

[2]The court emphasized that it did not reach the question whether civil service remedies available to Bush and other federal employees were intended by Congress to be a substitute for recovery directly under the Constitution and viewed by Congress as equally effective. *Bush v. Lucas, supra,* 647 F.2d at 577. See discussion *infra* at pp. 12-19.

Government employer-employee relationship in this case is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress." *Bush v. Lucas, supra,* 647 F.2d at 577. The court articulated two reasons for so holding: (1) the existence of statutory and administrative remedies for illegal employment practices in the federal service, and (2) the "unique relationship between the Federal Government and its civil service employees." *Id.* at 576. It did not, however, consider these reasons discretely. Instead, it analyzed the "unique" federal employment relationship exclusively in terms of the statutory and administrative structure surrounding that relationship.

This analysis is doubly faulty. First, though masquerading as a "special factor," the statutory scheme is, in reality, the *only* limitation considered by the court. Second, in collapsing the two distinct *Bivens* limitations into the statutory one, the lower court applied a significantly less demanding standard of adequacy to that statutory alternative than this Court has required in *Bivens, Davis,* and *Carlson.*

The Union's argument is that the federal employment relationship is not a "special factor counseling hesitation" in inferring a damage remedy in these circumstances; moreover, when judged by the standards laid down by this Court, the statutory remedies available to federal employees are not an adequate substitute for a *Bivens*-type action. Finally, no public interest is impaired by the result we urge here.

C. The Federal Employment Relationship Is Not A "Special Factor" Militating Against An Implied Right Of Action For Damages Against An Offending Federal Official.

The court below divined in the federal employment relationship a special factor counseling hesitation in inferring a *Bivens* remedy. *Bush v. Lucas,* 647 F.2d at 576. Relying on decisions of this Court, the Fifth Circuit noted the fundamental difference between the federal government as employer and the federal government as sovereign. *Id.* The employment relationship has unquestionably been seen to justify giving the government employer "wide discretion and control over the management of its personnel and internal affairs." *Id., citing Arnett v. Kennedy,* 416 U.S. 134, 168 (1974). With reference to the First Amendment, this Court has manifested its concern for the employer's broad discretion by holding that in certain contexts the speech of federal employees, unlike that of private citizens, is not constitutionally protected. *United Public Workers v. Mitchell,* 330 U.S. 75 (1947); *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) (state employees); *United States v. Snepp,* 444 U.S. 507 (1980). See also *Alfred Knopf Co. v. Colby,* 509 F.2d 1362 (4th Cir. 1975) *cert. denied* 421 U.S. 992 (1975). This Court has never held, however, that federal employees are precluded from vindicating their *recognized* First Amendment rights on the basis of their status as federal employees.

In cases concerning the speech and association rights of public employees, the Court has taken account of the public employment relationship solely in regard to whether the employees possessed the alleged substantive rights protected by the Constitution. *United Public Workers v. Mitchell, supra; Wieman v. Updegraff,* 344

U.S. 183 (1952); *Keyishian v. Board or Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education, 391 U.S. 563 (1968); United States Civil Service Commission v. National Association of Letter Carriers, supra, Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). The Court's approach is well illustrated by Justice White's opinion for the Court in the *Letter Carriers* case. The problems of governmental inefficiency and corruption were considered and given their due weight. *Letter Carriers, supra*, 413 U.S. at 555-556. These problems, however, were considered from the perspective of their impact on the substantive rights of federal employees and the extent to which the First Amendment curtailed Congress' power to limit the speech and association of those who work in the federal service. The Court's conclusion, after consideration of the special relationship between the government and its employees, was that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees." *Id.* at 556. The Court thus held that federal employees, unlike other citizens, do not possess the constitutional right to engage in certain partisan political activities.

The court below, however, went much further. It held that not only are federal employees' substantive rights more limited than those of other persons, but that they possess First Amendment rights which their status as federal employees prevents them from vindicating in the same manner as other persons. *Bush v. Lucas, supra*, 647 F.2d at 576. In so holding, the lower court relied extensively on this Court's decision in *Pickering v. Board of Education, supra*. In *Pickering*, however, the issue before the Court was, as in *Letter Carriers*, the extent to which the First Amendment protects certain forms of speech by public employees. In both cases, the Court's solicitude for

efficient public service dictated some limitation on the extent to which certain forms of speech by public employees are protected by the First Amendment. *Pickering, supra,* 391 U.S. at 568. But in neither *Pickering* nor *Letter Carriers,* nor indeed in any other case, has this Court found the relationship between the government and its employees to be a relevant factor in determining whether public employees may seek redress for their *recognized* and protected First Amendment rights through the normal means for such redress.

Thus, the "special" relationship between the government and its employees is considered when the initial balance is struck between the government's interest as an employer and the citizen's interest in individual expression. The result of this balancing delineates the First Amendment protection accorded to the speech and association of public employees. No decision of this Court, and no valid requirements of public policy, permit the relationship between the government and its employees to be doubly weighted against employees in First Amendment cases, as the lower court has done in this case. The government employer's legitimate concerns, already accounted for, cannot be taken into account a second time in determining whether, for an infringement upon a right found to be constitutionally protected, federal employees are entitled to "the ordinary remedy for an invasion of personal interests in liberty." *Bivens, supra,* 403 U.S. at 395.

The Fifth Circuit purported to find little guidance from this Court in determining whether special factors exist. *Bush v. Lucas,* 647 F.2d at 576. Yet it ignored the guidance which is at hand. Although this Court has not expressly defined the term, it has pointed to several examples of possible "special factors" which might counsel hesitation in inferring damage remedies. None of these examples were given serious treatment by the court below.

For example, political question considerations involving the relationship between the federal bench and a coordinate branch of government might, this Court has said, be a "special factor" militating against a damage action in federal court. *Davis v. Passman, supra,* 442 U.S. at 242, 246; *Carlson v. Green, supra,* 446 U.S. at 18, 19. Where, as in *Davis,* the implication of the right to sue a federal official for a constitutional tort might present conflicts with a constitutional provision or the respect due a coordinate branch of government, caution should be the rule. It cannot sensibly be argued, however, that the defendant in this case, or federal officials as a class, "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson v. Green, supra,* 446 U.S. at 19. See also *Butz v. Economou,* 438 U.S. 478 (1978); *Harlow v. Fitzgerald,* 50 U.S.L.W. 4815 (June 22, 1982) (federal executive officials possess only qualified immunity from civil damage suits based upon constitutional torts).

The Court has also noted that a significant adverse impact on the ability of federal officials to perform their duties might also counsel hesitation. *Id.* In *Carlson,* however, the Court concluded that, as to the defendant prison officials, "even if requiring them to defend respondent's suit might inhibit their official duties, the qualified immunity accorded them under *Butz v. Economou* provides them adequate protection." *Id.* (citations omitted); *see also Harlow v. Fitzgerald, supra,* 50 U.S.L.W. 4815 (June 22, 1982). The same protection is, of course, available here (see discussion *infra,* Point E., pp. 24-29).[3]

[3]The *Bivens* Court mentioned another "special factor": questions of "federal fiscal policy" as exemplified in *United States v. Standard Oil Co.,* 332 U.S. 301 (1947). That factor prevented inferring from the government-soldier relationship a cause of action for damages by the United States against one who negligently injures a soldier. Since Congress could legislate such liability at any time, and was "normally

We do not argue that there are no conceivable circumstances in which special factors might counsel hesitation in the implication of a *Bivens* remedy for *some* federal employees. None of these possible special factors, however, are even remotely present in this case.

In *Jaffee v. United States,* 663 F.2d 1226 (3rd Cir. 1981), the court held that soldiers cannot sue individual federal officials for constitutional torts occurring incident to military service. *Id.* at 1228. In so holding, the *Jaffe* court relied upon the effect that such suits might have upon "military discipline," *id.* at 1236, and the fear that such suits would provide situations when "military orders would be reviewed in a civilian court," *id.* at 1238, which the Supreme Court has found to lack competence in military affairs. See *Rostker v. Goldberg,* 448 U.S. 1306 (1981).

These and other national security considerations might well be legitimate special factors counseling hesitation in *Bivens* contexts. See *United States v. Snepp,* 444 U.S. 507 (1980); *Feres v. United States,* 340 U.S. 135 (1950); *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977); *Kannisto v. City of San Francisco,* 541 F.2d 841 (9th Cir. 1976) *cert. denied* 430 U.S. 931 (1977) (police officers); *Simpson v. Weeks,* 570 F.2d 240 (10th Cir. 1978) *cert. denied* 443 U.S. 911 (1979) (police officers). They have, however, no connection to this case. Nor do these considerations come into play in regard to the general right of federal employees to bring *Bivens* actions. The federal civil service is not based on military discipline. Federal courts are competent to review the constitutionali-

quite solicitous where the federal purse was involved," the Court treated it as a "special factor" which counseled against implication of a damage remedy. *Bivens, supra,* 403 U.S. at 397. The instant case does not present a question of judicial creation of an action for the benefit of the United States. Thus, no such considerations of "federal fiscal policy" are relevant.

ty of actions taken by civilian federal officials against civilian federal employees. Indeed, it requires no citation to state that a large portion of the work of the federal bench consists of reviewing the constitutionality of actions taken by civilian officials of the federal government.

A decision by this Court to permit Bush to sue Lucas individually for a constitutional tort would not, therefore, foreclose the possibility that in cetain limited circumstances a *Bivens* remedy would not be available to some federal employees. These circumstances, however, do not warrant a blanket prohibition on *Bivens* actions against federal officials who have used their positions to invade the constitutional rights of federal employees. The lower court, in imposing a blanket prohibition on *Bivens* suits by Bush and all federal employees, failed to examine the "special factors" limitation under the standards established by this Court and with the care and precision necessary where fundamental First Amendment values are at stake.

D. The Civil Service Remedies Available To Federal Employees For Violations Of Their Rights Under Federal Employment Statutes Are Not Alternative Remedies Which Congress Has Explicitly Declared To Be Substitutes For Recovery Directly Under The Constitution, And Which Congress Viewed As Equally Effective.

Except to hold that the government as employer should have exceedingly broad latitude in handling its "internal" affairs, the Fifth Circuit discussed no "special factors" other than the statutory remedies available to federal employees under the civil service laws. Instead of applying the limitations on *Bivens* actions established by this Court, the Fifth Circuit applied its own hybrid limitation on such

actions. In so doing, the Fifth Circuit treated statutory remedies as "special factors" and applied a significantly less demanding standard of adequacy to those statutory remedies than this Court has required when constitutional values are at stake.

The availability of alternative remedies is an entirely distinct limitation on a *Bivens* action, one which must be judged by the rigorous standards laid down by this Court. The court below thought itself free to avoid the question of the sufficiency of the available remedies, but at the same time to rely almost exclusively on their very availability. In this reasoning, the lower court erred.[4]

This Court has repeatedly stated that statutory remedies are to be limitations on *Bivens* actions only when "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson, supra,* 446 U.S. at 18, 19 (emphasis the Court's). When statutory remedies fail to meet this standard, as they did in

---

[4]We submit that the court below did in practical effect hold that the statutory remedies under the civil service laws were a sufficient substitute which Congress intended to pre-empt the constitutional cause of action. Its decision repeatedly emphasizes the "comprehensiveness of the legislative and statutory scheme" which Congress, through a "process of fine-tuning," has "painstakingly established." *Bush, supra,* 647 F.2d at 576-577. It is clear that the lower court believed these statutory remedies to be the product of a carefully considered balancing of efficiency and pesonal liberty by Congress. It is also clear, moreover, that this belief is the real rationale for the lower court's decision. The court below thus answered the question which it stated it did not reach: "whether Congress intended the civil service remedies to be an equally effective substitute for a *Bivens* remedy." *Id.* at 577. The question whether Congress in fact intended the civil service remedies to be a substitute for a *Bivens* remedy is therefore properly before this Court. A remand to the lower court would serve no useful purpose, and would unnecessarily prolong the already delayed resolution of this case.

Davis[5] and *Carlson,* they have no force as a bar to a *Bivens* cause of action. A statutory remedy either meets the requirements established in the decisions of this Court for pre-empting *Bivens* actions, or it does not. Where it does not, it cannot sneak back into the case as a "special factor" and deprive the victim of a constitutional violation of an effective remedy against a federal offical who has used his authority to violate the victim's fundamental rights.

We respectfully submit that under the standards set by this Court in *Bivens, Davis* and *Carlson,* it is impossible to conclude that Congress intended the civil service remedies available against the government to pre-empt suits for damages against individual officials charged with violations of a federal employee's constitutional rights.

The two most telling arguments may be simply stated. First, the statutory remedies available to federal employees for improper employment practices are remedies against the *United States or its agencies;* they are emphatically not remedies against *individuals* who have committed violations of federal employees' rights. None of the statutory remedies available to federal employees provide any form of relief from the wrongdoers themselves.[6] Second, the statutory remedies available to

[5]In *Davis,* the Court analyzed whether Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, was an "*explicit* congressional declaration that persons in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury." 442 U.S. at 246-247 (emphasis the Court's) (citations omitted).

[6]The question of the effectiveness of a remedy as a deterrent to unconstitutional action is, as this Court has recognized, central to the proper resolution of whether an implied right of action is necessary. *Carlson, supra,* 446 U.S. at 19. In an organization as large and hierarchical as the federal government, it is unlikely that any remedy which does not ultimately reach the individual wrongdoer will be effective. Instead, the individual wrongdoer might conclude that civil service remedies, such as reinstatement and back pay, are a small price to pay for the suppression, in Bush's case, of information regarding gover-

federal employees are founded upon statutory, merit system principles, not upon rights guarded by the Constitution. Though they will at times overlap, the focus of these statutory remedies is necessarily more constricted than the focus of a *Bivens* remedy.[7] Whatever the adequacy of these statutory remedies to provide protection against violations of civil service statutes and administrative rules,[8] these remedies were neither meant to provide, nor are they structurally capable of providing, full protection against violations of *constitutional* rights.

---

ment waste. Certainly, the civil service remedies are incapable of providing any deterrent whatsoever if individual wrongdoers are in fact *rewarded* for their illegal conduct. It is thus highly instructive that Lucas, the defendant in this case, was awarded a bonus of $20,000 under the Senior Executive Service program in 1980, *after* the Civil Service Commission had determined that Bush was demoted in retaliation for the exercise of his First Amendment rights. See Sinzinger, *Liberties For Some, Federal Times,* Vol. 17, No. 40, p. 2, col. 2 (November 30, 1981).

[7]This Court has recognized, albeit in a different context, that distinctly separate rights are "not vitiated merely because both were violated as a result of the same occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respective forums." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 50 (1974).

[8]While we do not claim that a *Bivens* remedy is the sole remedy available to federal employees who have been demoted in retaliation for the exercise of their constitutionally protected free speech, it is significant that the effectiveness of civil service remedies has been called into question by qualified authorities. See *Schroeder Calls For Abolition of MSPB Office of Special Counsel,* 964 GERR 5 (May 24, 1982). Representative Schroeder, a member of the House civil service subcommittee which formulated the Civil Service Reform Act, and now the subcommittee's chair, maintained that the MSPB Office of Special Counsel is "a fraud on the American taxpayer" which "is not doing the job that Congress gave it, to fight waste, fraud, and abuse." *Id.* She also noted that since June 1981 "No disciplinary actions have been sought against managers committing prohibited personnel practices." *Id.* Criticism of the effectiveness of civil service remedies has also come from the bench. See *Wren v. Merit System Protection Board,* 681 F.2d 867, 875 (D.C. Cir. 1982).

The most thorough analysis of alleged statutory substitutes for *Bivens* remedies is found in this Court's decision in *Carlson v. Green, supra. Carlson* originated as a suit brought by the estate of a deceased federal prisoner, alleging that federal prison officials had engaged in unconstitutional conduct which resulted in the prisoner's death. 446 U.S. at 46. An action for damages against the United States could have been brought under the Federal Tort Claims Act. Instead, the estate sought to bring a *Bivens* action directly under the Constitution against the individual federal officials who had violated the prisoner's constitutional rights. The Court in *Carlson* was thus presented with the question which is now before it: whether a *Bivens* cause of action is available against individual federal officials when the same facts would sustain a statutory cause of action against the United States.

In the course of resolving this question in favor of an implied right of action under the Constitution, the Court first asked whether anything in the statute or its legislative history showed "that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Id.* at 19. An affirmative showing of such intent was required; the burden of producing this affirmative showing, moreover, was squarely placed on the federal officials who sought to avoid personal liability. In its not sufficient, therefore, for federal officials to show that a statute does not specifically preserve a *Bivens* remedy. On the contrary, in the absence of indicia of Congress' intent to pre-empt or displace a *Bivens* remedy, a cause of action directly under the Constitution remains available against individual federal officials.[9]

[9]The significance of the lower court's error in casting the issue in this case as one of "special factors" becomes especially evident when the question of congressional intent is considered. When a case turns on "special factors counseling hesitation in the absence of affirmative action by Congress," *Bivens, supra,* 403 U.S. at 396, it is the *absence* of an explicit congressional statement which leads the court to refuse to provide a *Bivens* remedy; when a case turns on a congressionally

An examination of the statutes relevant to this case[10] reveals nothing which indicates that Congress intended these statutes to "replace, rather than to compliment, the *Bivens* remedy." *Id.* at 19, n.5. In addition, there is nothing in either the relevant statutory language or legislative history which indicates that Congress regarded

---

provided substitute remedy, on the other hand, the court must find *positive evidence* of an *affirmative congressional intent* to create a statutory alternative. The lower court has thoroughly inverted this analysis. Contrary to the principles laid down by the Court in *Bivens, Davis* and *Carlson,* the lower court inferred "special factors" from Congress' intent to provide civil service remedies to improperly demoted federal employees. Instead, it should have inferred from Congress' silence that it did *not* intend to pre-empt the *Bivens* remedy.

[10]The civil service remedies available to federal employees are established in the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), codified at 5 U.S.C. § 2301 *et seq.*, and the administrative rules promulgated thereunder. See 5 C.F.R. 1.1 *et seq.*

Under these statutes and regulations, a federal employee may not be subjected to an adverse personnel action as a reprisal for:

"(A) a disclosure of information . . . which the employee or applicant reasonably believes evidences –

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to the public health or safety.

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8).

A federal employee who suffers an adverse personnel action in violation of this Section may submit a complaint to the Special Counsel of the Merit Systems Protection Board (MSPB), which is authorized to investigate allegations of prohibited personnel practices. 5 U.S.C. § 1206(a)(1). The Special Counsel has discretion to file an order for corrective action with the MSPB. 5 U.S.C. § 1206(c). A nonprobationary employee may also independently pursue an appeal to the MSPB under 5 U.S.C. § 7701.

When the MSPB finds that an employee has been the victim of a prohibited personnel practice, it may award reinstatement and back pay, not damages. See 5 U.S.C. § 1205. See also 5 U.S.C. § 5596, 5 C.F.R. 550.801-807.

these civil service remedies as equally effective remedies for *constitutional* violations. *Id.* at 19.

There are, furthermore, several indications that Congress did not mean to displace *Bivens* remedies. Three of these factors were present in *Carlson* as well, "each suggesting that the *Bivens* remedy is more effective" and giving support to the Court's conclusion "that Congress did not intend to limit respondent to [a statutory] action." *Id.* at 2021. First, as the Court in *Carlson* emphasized, "the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. See *Butz v. Economou,* 438 U.S. 478, 505. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent" than a remedy available only against the United States. *Id.* at 21. The deterrent value of a particular remedy is greatly enhanced by the threat of damages, "surely particularly so when the individual faces personal financial liability." *Id.* Civil service remedies are thus "much less effective than a *Bivens* action as a deterrent to unconstitutional acts." *Id.* at 22.

Second, the Court in *Carlson* noted that punitive damages "may be awarded in a *Bivens* suit." *Id.* See *Carey v. Piphus,* 435 U.S. 247, 257, n.11 (1978); *Butz v. Economou, supra,* 438 U.S. at 504. Punitive damages are, of course, not available to federal employees under any statutory remedy for improper employment practices. More critically, however, the civil service remedies do not provide even full *compensatory* damages. A federal employee dismissed or demoted because of unconstitutional conduct by a federal official can obtain only reinstatement and back pay. Other real damages, such as pain and suffering, additional loss of income, and out-of-pocket expenses, are not compensable under any civil service remedy. These remedies, therefore, do not provide even minimally adequate compensation for the actual losses which may be suffered by a federal employee whose constitutional rights have been violated.

Third, juries are not available to plaintiffs in a civil service action, as they would be in a *Bivens* suit. *Id.* Petitioners in *Carlson* argued that this difference was not significant, since juries, they claimed, have been biased against *Bivens* plaintiffs. *Id.* In response, the Court noted that petitioners did not assert that judges trying the statutory claims would be any more receptive than *Bivens* juries, and that petitioners "cannot explain why the plaintiff should not retain the choice" to have the factual elements of the claim and the amount of damages decided by a jury. This same factor deserves equal weight in the instant case.

There are additional reasons for finding that the civil service remedies available to federal employees are not as effective as a *Bivens* remedy. Many unconstitutional acts which would sustain a *Bivens* claim cannot be remedied at all through a civil service proceeding. No civil service remedies are available, for example, for unconstitutional acts of false imprisonment, privacy invasion, conversion, or false arrest. The fact that the civil service statutes do not provide any remedies for these constitutional violations, which could be remedied through a *Bivens* action, is a clear indication that Congress did not contemplate displacement of preexisting *Bivens* rights when it provided civil service remedies for improper federal employment practices. Further evidence of Congress' intent not to displace preexisting *Bivens* remedies for federal employees is found in the fact that no mention of such intent is contained in the Civil Service Reform Act which was enacted nearly a decade after *Bivens* was decided.[11] If Congress

[11]The legislative history of the Civil Service Reform Act of 1978, codified at 5 U.S.C. § 2301 *et seq.*, leaves no doubt that Congress sought to achieve two objectives with the enactment of that legislation. First, Congress sought to improve the performance and efficiency of the federal service. Second, Congress sought to increase the protection of certain employee rights. These twin goals were stated in President Carter's message to Congress on March 2, 1978: "The objectives of the civil service reform proposals I am transmitting today are:

had meant the civil service remedies to "replace, rather than to complement," *Bivens* actions it could easily have said so. The fact that Congress was silent on this point lends strong support to the conclusion that Congress did not regard its civil service reforms as an equally effective substitute for direct recovery against individual federal officials under the constitution. In no event can that silence be read implicitly to pre-empt the *Bivens* remedy; this Court has said that such an intent must be "explicit." *Carlson v. Green, supra,* 446 U.S. at 19. At the very least, a positive showing of congressional intent is required to foreclose a *Bivens* action. No such showing is possible here.[12]

To strengthen the protection of legitimate employee rights; To provide incentives and opportunities for managers to improve the efficiency and responsiveness of the Federal Government; To reduce the redtape and costly delay in the present personnel system; To promote equal employment opportunity; To improve labor-management relations." H. Rep. No. 95-1403, 95th Cong., 2d Sess. 3 (1978), *reprinted in* I House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Civil Service Reform Act of 1978 at 640 (1979) (hereinafter "Legislative History"). It is thus clear that the Civil Service Reform Act was meant to increase the protection of certain employee rights, including "whistleblowing." See II Legislative History at 1607, 1633, 1680, 1725. But nowhere in the legislative history, nor indeed in the legislation itself, is there any indication that Congress meant to deprive federal employees of the right to seek damages against individual federal officials directly under the Constitution. The Civil Service Reform Act establishes a proscribed route for relief from the federal government for prohibited personnel practices; in contrast, a *Bivens* remedy provides relief from the offending *individual* for *constitutional* violations. Nothing in the Civil Service Reform Act or its legislative history reveals an intention to close the door to federal employees seeking a *Bivens* remedy.

[12]Additional evidence that Congress did not mean to displace a *Bivens* remedy is found in the following passage from the House Report, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 386, *reprinted in* I Legislative History 760:

> Right now, a Federal employee who "blows the whistle" (sometimes even to a congressional committee) on activities at his agency which are a violation of law, mismanagement, abuse of authority, waste of funds or a

For the above reasons, it cannot be maintained that the remedies available to federal employees for violations of their civil service rights were meant to be an equally effective substitute for recovery directly under the Constitution for violations of *constitutional* rights.[13]

> danger to the public may be more likely to be harassed or fired than praised or rewarded. *There is no effective means other than drawn out administrative and court proceedings for a whistleblower to set things right.* We all lose when reasonable and constructive criticism of agencies by those who know them best is stifled.
>
> (Emphasis added).

As this passage demonstrates, Congress probably did not even consider the possibilities of a *Bivens* remedy when it enacted the Civil Service Reform Act. It is thus impossible to conclude that Congress *intended* civil service remedies to be a substitute for a *Bivens* action or that it considered those to be as effective as a *Bivens* remedy. What is clear is that Congress sought to provide protection for federal employees who make good faith criticisms of waste in the federal government. It requires a Herculean leap, however, to conclude that because Congress was moved to provide some civil service protection it therefore intended to foreclose the possibility of direct relief under the Constitution against individual wrongdoers.

[13]The decision of this Court in *Brown v. General Services Administration*, 425 U.S. 820 (1976), does not indicate otherwise. In *Brown*, the Court held that Section 717 of the Civil Rights Act of 1964 provides the exclusive remedy for claims of discrimination in federal employment. *Id.* at 821. *Brown*, however, did not treat the question of a statutory versus a constitutional remedy. Nor did *Brown* treat the question of a remedy against the United States versus a remedy against individual federal officials. In contrast to the present case, *Brown* was concerned only with which statutory remedy would be available to the plaintiff. The principles guiding the Court's decision in that case, therefore, have no application here. See *Brown, supra*, 425 U.S. at 834. "In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." See also *Id.* at 835. "We have consistently held that a narrowly tailored employee compensation scheme pre-empts the more general tort recovery

E. Neither Government Efficiency Nor Scarce Judicial Resources Will Be Compromised By Permitting Federal Employees To Vindicate Their Constitutional Rights In Damage Actions, Since The Qualified Immunity Doctrine Will Prevent Suit In All But The Most Egregious Instances Of Intentional Invasion Of Clear Constitutional Rights.

The lower court repeatedly emphasized its concern with governmental efficiency and its fear that permitting federal employees to bring *Bivens* actions would tend to compromise that efficiency. *Bush, supra,* 647 F.2d at 576, 577. NTEU does not argue that the efficient operation of the federal government is an illegitimate concern. On the contrary, the benefits of an efficient federal service are obvious to anyone concerned with the national welfare. Efficiency, however, cannot be obtained at any price. The fundamental rights of the people, including those people who work in the national interest, must be respected. Above all, those rights which the Constitution guarantees against infringement by the government cannot be sacrificed in the name of governmental efficiency. In those cases where efficiency and fundamental constitutional rights come into conflict, efficiency must give way.

This case, however, presents no such conflict. By its decisions in *Butz v. Economou*, 438 U.S. 478 (1978), and

---

statutes." (Emphasis added.) In *Brown*, therefore, the Court had no occasion to consider the questions presented in the instant case. For this reason, the Court in *Brown* did not engage in the analysis of statutory schemes which it has held to be required in the context of a *Bivens* claim. See *Carlson v. Green, supra,* 446 U.S. at 19-21, *Davis v. Passman, supra,* 442 U.S. at 1246-247. It is highly significant that neither the decision of the Court, written by Justice White, nor the dissenting opinion filed by Justice Stevens and joined by Justice Brennan, contains any reference to *Bivens* or its progeny. The issues raised in *Bivens* and its progeny, and authoritatively answered there, were simply not relevant to the issues resolved in *Brown*. Similarly, the issues raised and decided in *Brown* are not relevant to the questions now before the Court.

Harlow v. Fitzgerald, 50 U.S.L.W. 4815 (June 22, 1982), this Court has carefully balanced the nation's legitimate concern with governmental efficiency against the important value of providing redress for the violation of constitutional rights by federal officials. The resulting balance is the doctrine of qualified immunity. Under this doctrine, "government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow, supra*, 50 U.S.L.W. at 4820.

Although the specific issue addressed in *Harlow* was different from the one presented here, *Harlow* is strikingly similar in several important respects to the case now before the Court. In *Harlow*, dismissed federal employee A. Ernest Fitzgerald sued federal executive officials for conspiracy to violate his First Amendment rights. Specifically, Fitzgerald alleged that these federal officials had conspired to dismiss him from the federal service after they learned "that Fitzgerald planned to 'blow the whistle' on some 'shoddy purchasing practices' by exposing these practices to public view." *Harlow, supra*, 50 U.S.L.W. at 4816. The defendant federal officials argued that suit could not be brought against them because they were entitled to absolute immunity. *Id.* at 4817. The result of granting such immunity would have been the insulation of federal officials from suits brought by persons in Fitzgerald's position: federal employees who have been subjected to administrative penalties for exercising rights guaranteed by the First Amendment. The Court in *Harlow*, however, refused to make this result the law of the land. *Id.* at 4818-4820.

The question of governmental efficiency was explicitly raised, considered and factored into the Court's decision. *Id.* at 4820. The Court concluded, moreover, that con-

siderations of efficiency were not sufficient to warrant a bar to Fitzgerald's First Amendment tort claims. *Id.* Justice Powell's decision for the Court emphasized three elements which supported the Court's conclusion that the defendants were not absolutely immune from Fitzgerald's First Amendment suit. First, the Court emphasized that the doctrine of qualified, or "good faith," immunity would prevent all but the most egregious, intentional constitutional violations from proceeding to trial. *Id.* at 4819. The Court explained that:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* [*v. Rhodes,* 416 U.S. 232 (1974)] that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.
>
> *Harlow, supra,* 50 U.S.L.W. at 4817, *quoting Butz v. Economou, supra,* 438 U.S. at 507-508.

Thus, efficiency in the government was held to be adequately served by providing federal officials with qualified immunity and not to require a total bar to Fitzgerald's tort claims under the First Amendment. Although the Court remanded the case for a consideration of the issue presented here – whether the federal employee stated a legally sufficient cause of action under *Bivens* – it is inconceivable that the Court would allow further account to be taken on remand of the need for government efficiency. The Court has already considered that concern

fully in its original immunity decision. *Harlow, supra,* 50 U.S.L.W. at 4821, n. 36.

Second, the Court in *Harlow* recognized that "[d]amages actions against high officials were . . . 'an important means of vindicating constitutional guarantees'." *Id.* at 4818, *quoting Butz, supra,* 438 U.S. at 506. In this regard, the Court noted that the greater the power of federal officials, the greater the potential for abuse. We submit that the power of federal officials is perhaps greatest when exercised in the context of authority over lower level federal employees, as the *Harlow* case itself illustrates. The Court also noted that in holding higher ranking federal officials not absolutely immune for constitutional torts to lower level federal employees such as Fitzgerald, it did not mean any "disparagement of the offices" held by such officials. *Id.*

Third, the Court made the significant point that "where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Id.* at 4820. A federal official should not hesitate any less where the constitutional rights to be intentionally and knowingly trespassed are those belonging to a member of the federal service.

It is clear then that federal officials will not be liable for constitutional violations committed against federal employees unless the official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action *with the malicious intention* to cause a deprivation of constitutional rights . . ." *Id.* at 4819, *quoting Wood v. Strickland,* 420 U.S. 308 (1975) (emphasis the Court's). This standard is sufficient to provide adequate protection to the nation's interest in government efficiency and the interest of federal officials in avoiding harassment or

liability for their unknowing or non-malicious mistakes. The qualified immunity doctrine should also prevent unwarranted expenditure of scarce judicial resources, particularly at the appellate level, where such scarcity is most acute. The lower court thus erred when it held that considerations of government efficiency required the prohibition of *Bivens* suits by federal employees seeking to vindicate their constitutional rights against abuse by federal officials.

The lower court also erred in holding that recognition of a *Bivens* remedy for federal employees would encourage those employees to bypass the civil service statutes in favor of direct judicial relief. *Bush, supra,* 647 F.2d at 577. As the facts of the present case make clear, aggrieved employees will pursue civil service remedies, as they must, to obtain reinstatement and back pay, even when a *Bivens* remedy is available against individual federal officials. A *Bivens* suit against an individual federal official cannot result in reinstatement. Nor can a civil service suit against the government result in damages. These remedies are distinct and different; they serve different purposes and reflect different values. The lower court, however, failed to recognize and appreciate these differences. As a result, the court below came to the erroneous conclusion that permitting federal employees to seek damages against individual federal officials for constitutional violations would discourage pursuit of completely distinct civil service remedies. Bush's actions in this proceeding indicate otherwise. There is, indeed, no reason to believe that aggrieved federal employees would not actively pursue all avenues of redress, including the important civil service remedies of reinstatement and back pay. A decision for

Bush in this case would not, therefore, in any way undermine the remedies created by Congress for improper employment practices.[14]

[14]We cannot comprehend the lower court's reasoning that a *Bivens* remedy for federal employees "would provide a disincentive for Congress to continue improving the mechanisms by which an aggrieved federal employee can protect his rights." *Bush, supra,* 647 F.2d at 577. By such reasoning, no cause of action should ever be judicially created, including that recognized in the *Bivens* decision, since its very effectiveness provides a disincentive for further congressional action. This Court, however, has emphatically rejected the notion that the power to authorize damages as a remedy for the vindication of a constitutional right lies exclusively in Congress. See *Bivens, supra,* 403 U.S. at 401-406 (Harlan, J., concurring). Where constitutional rights require protection, the judiciary cannot sit on its hands for fear that providing such protection would act as a disincentive for Congress to do so itself.

CONCLUSION

The judgment of the Fifth Circuit should be reversed and remanded with instructions to permit Bush to proceed to trial on his *Bivens* claim against Lucas.

Respectfully submitted,

Robert M. Tobias
General Counsel

John F. Bufe
Deputy General Counsel

Lois G. Williams
Associate General Counsel

Michael David Fox
Assistant Counsel

National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
(202) 785-4411

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF *AMICUS CURIAE* OF REPRESENTATIVES PATRICIA SCHROEDER, DANTE B. FASCELL, MORRIS K. UDALL, SHIRLEY CHISHOLM, BRUCE F. VENTO, DONALD JOSEPH ALBOSTA, GERALDINE FERRARO, MIKE LOWRY, THOMAS E. PETRI, AND SENATOR WILLIAM PROXMIRE, MEMBERS OF CONGRESS, AND THE NATIONAL TAXPAYERS UNION, IN SUPPORT OF PETITIONER

JOHN C. KEENEY, JR.
(Counsel of Record)
JOSEPH M. HASSETT
NELL HOFFMAN

HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-5750

Counsel for *Amicus Curiae* Representative Patricia Schroeder, et al.

Of Counsel:

PETER RAVEN-HANSEN
The National Law Center
George Washington University
Washington, D.C. 20052
(202) 676-8171

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Petitioner's Status as a Federal Employee Does Not Preclude an Implied Cause of Action Under the First Amendment	3
A. The Court Below, in Denying a *Bivens* Remedy, Failed to Follow the Controlling Decisions of this Court	4
B. The Reasons of the Court Below for Denying a *Bivens* Remedy Are Speculative and Without Merit	5
II. The Mere Availability of Civil Service Administrative Remedies to a Federal Employee Does Not Preclude an Implied Cause of Action Under the First Amendment	11
III. Denial of a *Bivens* Remedy for Federal Employees Will Interfere with Effective Exercise of the Congressional Function of Oversight and Investigation of the Executive Branch	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Barenblatt v. *United States*, 360 U.S. 109 (1958) 17
Bishop v. *Tice*, 622 F.2d 349 (8th Cir. 1980) 6n, 9, 9n
Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) .....*passim*
Borrell v. *United States Int'l Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982) 13
Branti v. *Finkel*, 445 U.S. 507 (1980) 4
Bush v. *Lucas*, 647 F.2d 573 (5th Cir.), *cert. granted*, 102 S. Ct. 3481 (1982) 4, 5, 7, 11
Butz v. *Economou*, 438 U.S. 478 (1978) 7, 9n, 11
Carlson v. *Green*, 446 U.S. 14 (1980) .....*passim*
Davis v. *Passman*, 442 U.S. 228 (1979) 3, 5, 6, 11
Dellums v. *Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) 4n
Eastland v. *United States Servicemen Fund*, 421 U.S. 491 (1975) 17
Elrod v. *Burns*, 427 U.S. 347 (1976) 4, 8n
Fitzgerald v. *Seamans*, 553 F.2d 220 (D.C. Cir. 1979) 9n
Harlow v. *Fitzgerald*, 102 S. Ct. 2727 (1982) 8, 17
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 9n
Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 4
McGrain v. *Daugherty*, 273 U.S. 135 (1927) 17
Monroe v. *Pape*, 365 U.S. 167 (1961) 11n
Nixon v. *Fitzgerald*, 102 S. Ct. 2690 (1982) 8n
Paton v. *La Prade*, 524 F.2d 862 (3d Cir. 1975) 4n
Patsy v. *Board of Regents of State of Fla.*, 102 S. Ct. 2557 (1982) 3, 9n, 14n
Pickering v. *Board of Education*, 391 U.S. 563 (1968) 4, 5, 8, 8n, 10
Rosado v. *Santiago*, 562 F.2d 114 (1st Cir. 1977) 10n
Simpson v. *Weeks*, 570 F.2d 240 (8th Cir. 1978), *cert. denied*, 445 U.S. 911 (1979) 10n, 11n
Sonntag v. *Dooley*, 650 F.2d 904 (7th Cir. 1981) 6
Trapnell v. *Riggsdy*, 622 F.2d 290 (7th Cir. 1980) .. 4n

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Standard Oil*, 332 U.S. 301 (1947)	6
Watkins v. *United States*, 354 U.S. 178 (1957)	17
Wheeldin v. *Wheeler*, 373 U.S. 647 (1963)	6
Yiamouyiannis v. *Chemical Abstracts Service*, 521 F.2d 1392 (6th Cir. 1975), *cert. denied*, 439 U.S. 983 (1978)	4n
STATUTES AND REGULATIONS:	
U.S. Const.	
Amend. I	*passim*
Amend. IV	3n
Amend. V	3n
Amend. VIII	3n
Amend. XIV	10
42 U.S.C. § 1983	9n, 10, 11n, 16n
Civil Service Reform Act, 5 U.S.C. § 1101 et seq.	10, 12n, 13, 14, 15n
5 U.S.C. § 5596	12
5 C.F.R. § 752.202	12
§ 752.203(a)	12
§ 752.304(c)	12
§ 752.402	12
§ 752.310(a)	12
OTHER AUTHORITIES:	
68 Amer. Bar. Ass. J. 1065 (Sept. 1982)	14
Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, Hearings Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 1 (1978)	13, 14n, 17n, 18n
Civil Service Reform Oversight, 1980-Whistleblowers: Hearings before the Subcomm. on the Civil Service of the House Comm. on Post Office and Civil Service, 96th Cong., 2d Sess. (1980)	16
124 Cong. Rec. S14280 (daily ed. Aug. 24, 1978) (remarks of Senator Sasser)	14n

TABLE OF AUTHORITIES—Continued

Page

H.R. No. 6392, 97th Cong., 2d Sess., 128 Cong. Rec. 2271 (daily ed., May 17, 1982) 14n

Merit Systems Protection Board, *Do Federal Employees Face Reprisal For Reporting Fraud, Waste or Mismanagement* (1981) 14n, 15n

Office of the Special Counsel, *Report to the Chairwoman, Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service for the period April 1, 1981 to March 31, 1982* 16n

S. Rep. No. 969, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723 ..... 10, 13

Staff of House Comm. on Post Office and Civil *Service*, 96th Cong., 1st Sess., *Legislative History of the Civil Service Reform Act of 1978* (Comm. Print 1979) 13n

Staff of Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption* (Comm. Print 1978) 14, 14n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-469

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF *AMICUS CURIAE* OF REPRESENTATIVE PATRICIA SCHROEDER, ET AL., MEMBERS OF CONGRESS, AND THE NATIONAL TAXPAYERS UNION, IN SUPPORT OF PETITIONER

INTEREST OF AMICI

This brief is submitted on behalf of current members of the United States Congress and the National Taxpayers Union. Congressional *amici* have a strong interest in obtaining accurate and truthful information from federal employees of the Executive branch in order that Congress might exercise effectively its constitutional duty to oversee the execution of its laws by that branch. Because denial to federal employees of an implied cause of action under the First Amendment may chill the flow of information from such employees and thereby impede the important congressional function of informed and effective oversight,

amici submit the following brief in support of petitioner.[1] The National Taxpayers Union is an organization committed to protecting the taxpayers by reducing unnecessary federal government spending, a goal which is furthered by protecting federal employees who disclose such spending.

SUMMARY OF ARGUMENT

The lower court's denial of a *Bivens* remedy to federal employees is contrary to the controlling decisions of this Court. *Carlson* v. *Green*, 446 U.S. 14 (1980), recognized only two limited situations in which a *Bivens* remedy was inappropriate. Neither is present here.

The holding of the court below that the federal employment relationship is a special factor precluding a *Bivens* remedy is inconsistent with prior holdings of this Court and is an unwarranted expansion of a narrow exception to the *Bivens* doctrine. Furthermore, to the extent that federal employment might pose any special concerns, these concerns are coextensive with the qualified immunity available to federal supervisory officials, and do not justify denial of a *Bivens* remedy.

The express reliance by the court below, in denying a *Bivens* remedy, on the availability of alternative civil service remedies was in error because the court below failed to make the findings, required by *Carlson*, that Congress intended these civil service remedies to be exclusive and viewed these remedies as equally effective. Indeed, congressional intent is clearly to the contrary, and supports the implication of a *Bivens* remedy.

Denial of a *Bivens* remedy will interfere with the ability of Congress to obtain information from federal employees and thereby hinder the effective exercise of the congressional oversight function.

---

[1] The parties' letters of consent are being lodged with the Clerk pursuant to Rule 36.1.

ARGUMENT

I. Petitioner's Status as a Federal Employee Does Not Preclude an Implied Cause of Action Under the First Amendment

Petitioner, a civil service aerospace engineer, was reduced in grade and transferred, after making certain statements to the media. Because the case is before this Court on respondent's motion for summary judgment, the factual allegations in petitioner's complaint must be accepted as true. *See Patsy* v. *Board of Regents of State of Fla.*, 102 S. Ct. 2557, 2559 n.1 (1982). Thus, accepting as correct petitioner's contention that respondent has penalized him for the exercise of protected First Amendment rights, the Court must decide what remedies are available to petitioner for this constitutional violation.

It is well established that victims of a constitutional violation by a federal official have an implied right under the Constitution to recover damages against that official in federal court, even in the absence of a statute conferring such a right. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis* v. *Passman*, 442 U.S. 228 (1979); *Carlson* v. *Green*, 446 U.S. 14 (1980). As this Court held in *Carlson* v. *Green*, *supra*, a *Bivens* remedy for damages against a federal official for unconstitutional conduct is implied under the Constitution except in two very limited circumstances: (1) "when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress'" or (2) "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Carlson* v. *Green*, *supra*, 446 U.S. at 18-19.[2]

---

[2] While *Bivens*, *Davis*, and *Carlson* authorized implied causes of action under the Fourth, Fifth, and Eighth Amendments respectively, this Court in *Carlson* made it clear that a *Bivens*-type

Because the court below initially applied a different analysis in this case, this Court vacated the initial judgment and remanded "for further consideration in light of *Carlson* v. *Green*." *Bush* v. *Lucas*, 446 U.S. 914 (1980). Thereafter, the court below purported to apply the *Carlson* v. *Green* tests but reinstated its previous conclusions. Contrary to the conclusion of the court below, neither of the two limited exceptions set forth in *Carlson* is met in this case and accordingly a direct cause of action should be implied.

A. The Court Below in Denying a *Bivens* Remedy Failed to Follow the Controlling Decisions of this Court

It is well established that the First Amendment protects all public employees against firing or demotion by reason of the exercise of the constitutional right of free speech. *See, e.g., Branti* v. *Finkel*, 445 U.S. 507 (1980); *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). This Court has explicitly recognized the right of public employees to comment on "matters of public interest," even if these matters concern the operation of the agency in which they are employed or concern their superiors. *Pickering* v. *Board of Education*, 391 U.S. 562, 568, 574 (1968). The degree of First Amendment protection accorded to a public employee strikes a balance between the employee's interest in comment upon matters of public concern, and the governmental employer's interest in the efficient provision of public services. *Pickering* v. *Board of Educa-*

---

remedy was available to any "victim of a constitutional violation," *id.* at 18, and not limited to violations of particular amendments. Thus, implied causes of action under the First Amendment have been upheld in many circuit courts of appeals. *E.g.*, Trapnell v. Riggsdy, 622 F.2d 290, 294 (7th Cir. 1980); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Paton v. La Prade, 524 F.2d 862, 869-71 (3d Cir. 1975); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1975) (*per curiam*), *cert. denied*, 439 U.S. 983 (1978).

tion, *supra*, 391 U.S. at 568. This constitutional balance is struck in favor of the employee even in situations where he "has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer." *Id.* at 572.

For purposes of its decision, the court below did not dispute that petitioner's statements were protected by the First Amendment. Rather, it held that the relationship between the federal government and its employees was a "special factor counseling hesitation" in inferring a *Bivens* remedy and therefore concluded that a federal employee had no implied cause of action for damages under the First Amendment. This holding was in error for the following reasons.

First, it is inconsistent with *Davis* v. *Passman*, *supra*, in which the government employer-employee relationship was not held to be a "special factor" precluding a *Bivens* remedy. In *Davis*, a deputy administrative assistant sued her employer Congressman Otto E. Passman for sex discrimination in the termination of her employment. Despite the existence of a governmental employer-employee relationship in *Davis*, this Court readily inferred an implied cause of action under *Bivens*. *Davis* squarely contradicts the conclusion of the court below that the government employer-employee relationship *per se* falls within the first prong of the *Bivens-Carlson* exceptions, namely a "special factor counselling hesitation" in implying a *Bivens* remedy.

Second, the court below misapplied *Carlson*. The court relied heavily on the availability of alternative civil service remedies, but purported not to reach the second prong of the *Carlson* test which requires a finding that alternative remedies are equally effective. *Bush* v. *Lucas*, *supra*, 647 F.2d 573, 577 (5th Cir. 1981). Instead the court found that the availability of the civil service remedies was a "special factor" under the first prong. This analysis collapses this Court's two carefully defined excep-

tions into one, and effectively negates the *Carlson* requirement that only those remedies which are specifically declared by Congress to be equally effective substitutes may be deemed sufficient to preclude a *Bivens* remedy. *Carlson, supra*, 446 U.S. at 18-19. *See Sonntag* v. *Dooley*, 650 F.2d 904, 907 (7th Cir. 1981). If upheld, the analysis of the court below would deny a *Bivens* remedy in any case where any alternative remedy whatsoever is available;[3] precisely this analysis was rejected in *Carlson*. There, this Court held that the mere presence of an alternative remedy under the Federal Tort Claims Act did not preclude a *Bivens* remedy, because Congress had not explicitly declared it equally effective. The court below made no finding of such congressional declarations, as required by *Carlson* (nor could the court have made such a finding, as explained in Section II below).

Third, the expansive reading by the court below of the *Bivens* exception for "special factors counselling hesitation" is wholly at odds with the narrow construction of that *Bivens* exception by this Court. The *Bivens* opinion recognized only two unique circumstances where an implied constitutional remedy was precluded by "special factors counseling hesitation": (1) cases involving "federal fiscal policy" where the United States was a plaintiff, such as *United States* v. *Standard Oil*, 332 U.S. 301 (1947) and (2) cases involving liability of a congressional employee for non-constitutional claims, such as *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963). *Bivens, supra*, 403 U.S. at 396. Neither of these "special factors" is present here. Yet a third "special factor counselling hesitation" was recognized in *Davis* v. *Passman, supra*, where this Court stated that employment discrim-

[3] This same error was committed by the Eighth Circuit in Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980), relied upon by the court below, which stated—erroneously—that "a *Bivens* analysis is obviated once an adequate federal remedy is shown to exist." *Id.* at 356 n.12. The proper test is whether the remedy is equally effective —not merely "adequate"—and whether Congress intended to preclude the *Bivens* remedy.

ination by a Congressman raised "special concerns counselling hesitation" due to the defendant's status as a Congressman; such concerns were nevertheless held not to preclude a *Bivens* remedy since they were accommodated by the coextensive protections of the Speech or Debate Clause. Similarly, to the extent that the governmental office of respondent here might otherwise raise a "special factor counselling hesitation," that factor is already accommodated by coextensive qualified immunity which attaches to actions in discharge of that office. Indeed, this Court has already expressly held that even where the defense of a *Bivens* action would inhibit the performance of official duties by defendant officers, this is not a "special factor" sufficient to preclude a *Bivens* remedy. *Carlson*, *supra*, 446 U.S. at 19.

B. The Reasons of the Court Below for Denying a *Bivens* Remedy Are Speculative and Without Merit

The decision of the court below is not only contrary to this Court's previous decisions, but the purported justifications for the lower court's decision are in any event unsound. The court below offered three reasons to support its conclusion that a *Bivens* remedy was inappropriate in this case. *Bush*, *supra*, 647 F.2d at 577. All these reasons are without merit.

First, it is an oversimplification to state that "inferring a *Bivens* remedy in this case would tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs." *Bush*, *supra* at 577. "The traditional control of the Government over its internal and personnel affairs" is not absolute; it is qualified by the First Amendment rights of federal employees. *See*, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 495 (1978) ("[I]t cannot be doubted that these [federal] officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution"). The extent of that constitutional protection in any given case will require a balancing between the First Amendment right of the public employee

and the legitimate needs of the governmental employer. *Pickering* v. *Board of Education, supra*, 391 U.S. at 568. It is difficult to understand how the granting of a remedy to enforce a constitutional right interferes with the government to any greater extent than does the existence of the constitutional right itself. Moreover, absent proof by the governmental employer, this Court has repeatedly rejected as conclusory a bald claim that the exercise of a First Amendment right has interfered with the operation of a governmental agency. *E.g., Pickering* v. *Board of Education, supra*, 391 U.S. at 572-73. Furthermore, to the extent that defense of an action for damages might inhibit official duties, the defense of qualified immunity will "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow* v. *Fitzgerald*, 102 S. Ct. 2727, 2739 (1982); *Carlson, supra*, 446 U.S. at 19.[4]

Second, fear that a *Bivens* remedy would encourage the bypassing of civil service remedies is mere speculation unsupported by any evidence. The record is clear that petitioner did pursue his civil service remedies.[5] As the

---

[4] Moreover, the scope of the *Bivens* remedy is limited by the scope of the First Amendment protection. For example, the First Amendment does not extend to the dismissal of policymaking confidential employees who are discharged by reason of their political affiliation. Elrod v. Burns, 427 U.S. 349 (1976). Furthermore, this Court has recognized that different considerations are involved under the First Amendment in "positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship." Pickering v. Board of Education, *supra*, 391 U.S. at 570 n.3. Thus, in those instances where the First Amendment balance tilts in favor of the government, the appropriate legal response is summary judgment on the merits, not denial of a *Bivens* cause of action.

[5] Similarly, in Nixon v. Fitzgerald, 102 S. Ct. 2690, 2695 (1982), another federal employee who was the victim of unlawful personnel actions pursued civil service remedies as well as *Bivens* and other remedies. There is nothing unusual or inap-

Eighth Circuit correctly noted in *Bishop* v. *Tice*, *supra*, 622 F.2d at 357, "[a] widespread evasion of civil service discharge appeal procedures in order to seek direct judicial relief is admittedly unlikely." It is unlikely for three reasons. First, the burden of proof is on the plaintiff in *Bivens* actions, whereas in the civil service proceedings, the governmental employer has the burden of proving the adverse action was for cause.[6] Second, the defense of qualified immunity is available to defendants under *Bivens*, but not in civil service proceedings.[7] Third, a *Bivens* action for damages from an official in his individual capacity would not permit agency reinstatement as appropriate relief,[8] because the agency is not a defendant.[9]

The third rationale of the court below—that a *Bivens* remedy would be a disincentive for congressional action to improve civil service remedies—is sheer speculation

---

propriate about the simultaneous availability of independent administrative and judicial alternative remedies to an aggrieved party. Fitzgerald v. Seamans, 553 F.2d 220, 226 (D.C. Cir. 1979) (noting that employee has choice of either or both *Bivens* and civil service remedies). *See* Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (Title VII and 42 USC § 1983). *See also* Carlson v. Green, *supra* (*Bivens* and Federal Tort Claims Act).

[6] Bishop v. Tice, *supra*, 622 F.2d at 357 n.15.

[7] *See generally*, Butz v. Economou, *supra*, 438 U.S. 478.

[8] *See* Bishop v. Tice, *supra*, 622 F.2d at 357 n.15.

[9] For many of the same reasons that petitioner urges that a *Bivens* remedy be made available to him, the courts have not required exhaustion of administrative remedies for constitutional claims. *See, e.g.*, Patsy v. Board of Regents of State of Fla., 102 S. Ct. 2557 (1982). But should the future see evidence, here clearly lacking, that administrative remedies are being bypassed in favor of *Bivens* actions, surely judicial imposition of an exhaustion requirement would be better tailored to the problem than denial of the *Bivens* remedy altogether. Of course any such requirement would be satisfied on the facts of this case.

that is belied by the history of congressional concern for federal employees. From as far back as the Pendleton Act of 1883 to the Civil Service Reform Act of 1978, this congressional concern has been unwavering. Although by 1978, three circuits had found an implied cause of action under the First Amendment,[10] the creation of a *Bivens* remedy did not lessen congressional interest. To the contrary, on October 13, 1978, Congress enacted the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as 5 U.S.C. 1101 *et seq.*) which was "the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883."[11] Thus, fears of congressional inaction have proven groundless. Moreover, there is no reason to suspect that congressional attention would wane should this Court endorse the *Bivens* remedy recognized by the Third, Sixth, Seventh and D.C. Circuits.

Moreover, there are additional reasons—not considered by the court below—which weigh against any finding that the federal employee's relationship with the federal government is a special factor precluding a *Bivens* remedy. First, it would be anomalous to deny federal employees the constitutional equivalent of the cause of action which is extended to state and local employees under the First and Fourteenth Amendments and 42 U.S.C. § 1983. It is well established that state and local employees can sue their governmental employer for violation of the First and Fourteenth Amendment,[12] can recover damages for such a constitutional violation,[13] and need not

---

[10] *See* note 2, *supra*.

[11] S. Rep. No. 969, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723.

[12] Pickering v. Board of Education, *supra*.

[13] *E.g.*, Simpson v. Weeks, 570 F.2d 240, 241 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979); Rosado v. Santiago, 562 F.2d 114 (1st Cir. 1977).

exhaust state administrative remedies, including analogous state civil service procedures.[14] There is no persuasive justification why *federal* employees should be accorded less judicial protection than their state and local counterparts. Indeed, " 'the constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Carlson*, *supra*, 446 U.S. at 22; *Butz* v. *Economou*, *supra*, 438 U.S. at 504. Second, it would be anomalous to subject members of Congress to potential liability under *Bivens*, arising out of an employment relationship, *see Davis* v. *Passman*, *supra*, while exempting all federal supervisory employees in the Executive branch from similar liability.

II. The Mere Availability of Civil Service Administrative Remedies to a Federal Employee Does Not Preclude an Implied Cause of Action Under the First Amendment

This Court held in *Carlson* v. *Green*, *supra*, that one situation in which a *Bivens* remedy would not be allowed is "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and equally as effective." *Id.* at 18-19. The court below purported not to reach the question under *Carlson* of whether Congress intended the civil service remedies to be an equally effective substitute for a *Bivens* remedy, *Bush* v. *Lucas*, *supra*, 647 F.2d at 577, yet conceded that "we stress the remedies made available by Congress to an aggrieved civil servant in order to emphasize the care Congress has taken . . . ." *Bush* v. *Lucas*, *supra*, 647 F.2d at 576. Thus, it concluded that a *Bivens* remedy was barred regardless of whether Congress intended the

---

[14] Patsy v. Board of Regents of State of Fla., 102 S. Ct. 2557 (1982) (no exhaustion of state administrative remedies required in employment discrimination suit under 42 USC § 1983); Monroe v. Pape, 365 U.S. 167, 183 (1961). *See, e.g.*, Simpson v. Weeks, *supra*, 570 F.2d at 241.

civil service remedies to be an equally effective substitute for a *Bivens* remedy.

The administrative remedies available to a federal employee in 1975 were limited.[15] A federal employee was entitled to notification and an opportunity to be heard before an agency representative in the event of a reduction in grade, as in this case. 5 C.F.R. § 752.202. If the final decision of the agency representative was adverse to the employee, he had the right to appeal to the Federal Employees' Appeals Authority in the Civil Service Commission.[16] 5 C.F.R. §§ 752.203(a), 772.304(c). If the decision of the Appeals Officer was adverse to the employee, the employee could request review from the Civil Service Commission Appeals Review Board. 5 C.F.R. § 772.310(a). If ultimately successful in the administrative process, a federal employee was entitled to reinstatement and back pay. 5 U.S.C. § 5596 and 5 C.F.R. § 752.402 (1974).

The availability of these civil service remedies does not bar an action for damages under *Bivens*. The government has not shown—and cannot show—that Congress expressly declared that the civil service remedies were intended as an equally effective substitute for a *Bivens* remedy. Nothing in the legislative history of various civil service acts shows that Congress meant to preempt a *Bivens* remedy or to create an equally effective substitute remedy for constitutional violations.

Many of the civil service acts were enacted prior to the Court's decision in *Bivens*.[17] Even when Congress

---

[15] By letter dated November 25, 1975, petitioner Bush was reduced in grade and transferred. Joint App. at 15.

[16] As part of the Civil Service Reform Act of 1978, the Civil Service Commission was replaced by two agencies, the Office of Personnel Management and the Merit Systems Protection Board.

[17] *E.g.*, the Pendleton Act of 1883, the Lloyd-La Follette Act of 1912, the Back Pay Act of 1948, the Back Pay Act of 1966.

enacted the Civil Service Reform Act of 1978, some seven years after the *Bivens* decision, Congress did not state that a *Bivens* remedy was preempted.[18] On the contrary, the Congressional concern in 1978 was to provide additional, not diminished, protection for federal employees who spoke out on waste in government. *See* S. Rep. No. 969, 95th Cong., 2d Sess. 2 (1978) *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2724 ("the bill . . . [p]rovides *new* protections for employees who disclose illegal or improper Government conduct . . .") (emphasis supplied). Senator Abraham Ribicoff, Chairman of the Senate Committee on Governmental Affairs, stated that one of the purposes of the 1978 Act was to provide "*greater* protection for employees who lawfully disclose violations of laws and regulations in these agencies." *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, Hearings Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 1 (1978) (emphasis supplied). Alan K. Campbell, Chairman of the Civil Service Commission, testified that the Act's creation of a Special Counsel to deal with whistleblowers who are the victims of agency reprisals "will be an *additional protection* in the system." *Id.* at 33. Thus, the D.C. Circuit correctly concluded in *Borrell* v. *United States Int'l Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982), that "Congress intended the CSRA to provide *additional*, not decreased, protection for federal employees who blow the whistle on illegal or improper government conduct." *Id.* at 990.

In any event, the provisions of the Civil Service Reform Act of 1978 do not apply to petitioner Bush because his claim accrued in 1975, prior to the January 1979

---

[18] The entire legislative history of the Civil Service Reform Act of 1978 has been published in two volumes. Staff of House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Civil Service Reform Act of 1978* (Comm. Print 1979).

effective date of the Civil Service Reform Act of 1978.[19] Thus, regardless of the effectiveness of the 1978 reforms—and there is much to suggest that even these 1978 reforms were inadequate [20]—it is the effectiveness of the pre-1978 civil service remedies which were applicable to petitioner Bush that are relevant here.

Their ineffectiveness is demonstrated by the need to add the additional protections of the 1978 Act. Moreover, Congress was also explicit in 1978 about the ineffectiveness of civil service remedies. The Senate Committee on Governmental Affairs concluded "[t]he Civil Service Commission has been ineffective in protecting the rights of whistleblowers." [21] This conclusion was amply

---

[19] Section 907 of the Civil Service Reform Act of 1978, Pub. L. 95-454, provided that the effective date was ninety days after enactment on October 13, 1978.

[20] A recent survey of federal employees by the Merit Systems Protection Board revealed that "[T]here is great uncertainty about the adequacy of whistleblower protection but most of those who venture an opinion believe they are inadequate" and that "[e]mployees express general skepticism about the very possibility of their being effectively protected against reprisals." Merit Systems Protection Board, *Do Federal Employees Face Reprisal For Reporting Fraud, Waste, or Mismanagement* 4-5 (1981). Such skepticism is justified. In three and a half years of operation, the Office of Special Counsel "has yet to win a case before the board establishing that a whistleblower's rights have been violated." 62 Amer. Bar Ass. J. 1065 (Sept. 1982). The Office has been so ineffective that a principal proponent of civil service reform has introduced legislation to abolish the Office of Special Counsel of the Board. *See* H.R. 6392, 97th Cong., 2d Sess., 128 Cong. Rec. 2271 (daily ed. May 17, 1982) (Cong. Schroeder).

[21] Staff of Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption* (Comm. Print 1978). *See also* 124 Cong. Rec. S14280 (daily ed. Aug. 24, 1978) (remarks of Senator Sasser) ("patriotic employees who bring examples of official wrongdoing to the public's attention have, in the past, enjoyed no meaningful protection against reprisals. . . .").

supported by the evidence before Congress, including the candid admission by the Chairman of the Civil Service Commission that "there is insufficient protection for employees—so-called 'whistleblowers'—who are harassed for calling attention to violations of laws and regulations within their agencies." [22]

Thus, the 1978 legislative history is abundantly clear that Congress did *not* view the pre-1978 civil service remedies as equally effective as a *Bivens* remedy. Rather, the Congressional opinion was that the civil service remedies were ineffective. This is far short of the requirement that there be a demonstration of a specific congressional intent to provide an equally effective substitute for *Bivens*. Under the *Carlson* test, a *Bivens* remedy cannot appropriately be denied.

Moreover, here, as in *Carlson*, there are additional significant differences between the administrative remedies and the *Bivens* remedy which support the conclusion that the *Bivens* remedy is more effective than either pre-1978 or post-1978 civil service remedies.

First, as in *Carlson*, the *Bivens* remedy here would serve as a more effective deterrent than the civil service remedy because the *Bivens* remedy is recoverable from the individual constitutional offender. *Carlson*, *supra*, 446 U.S. at 21. To Congress, this deterrent potential is critical, especially in light of the general skepticism among federal employees about the efficacy of civil service remedies.[23] The Civil Service remedy of reinstate-

---

[22] *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, Hearings Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 91 (1978) (statement of Alan K. Campbell).

[23] See federal employee survey, note 20, *supra*. The Civil Service Reform Act of 1978 did authorize the Special Counsel to seek disciplinary action in appropriate cases against violators of whistleblower rights. 5 USC §§ 1206(g)(1) and 1207. To our knowl-

ment with back pay, which petitioner received here, is not directed at the offending official and has little deterrent effect. However, the prospect of individual liability for unconstitutional action has an almost axiomatic deterrent effect. *Carlson, supra*, 456 U.S. at 21.

Second, as in *Carlson*, the *Bivens* remedy may involve punitive damages, which this Court recognized are "especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." *Id.* at 22. Punitive damages are not available in administrative proceedings, and petitioner has been limited to reinstatement with back pay even though respondent's acts have taken years from petitioner's career.

Third, the civil service remedies do not provide for a trial by jury as does *Bivens*. *Carlson, supra* at 22.

Thus, petitioner's *Bivens* action cannot properly be denied under *Carlson* since (1) there is no specific legislative mandate that the remedy is precluded by an equally effective substitute remedy; (2) to the contrary, the legislative history indicates that Congress believed the civil service remedies to be ineffective at the time of the adverse actions affecting petitioner Bush and (3) the *Bivens* action is superior to civil service remedies in deterrent effect, availability of punitive damages, and a jury trial.

---

edge, no such disciplinary actions have been taken in any case involving whistleblowers. *See Civil Service Reform Oversight, 1980-Whistleblowers: Hearings Before the Subcomm. on the Civil Service of the House Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. 17 (1980) (statement of Mary Eastwood, Acting Special Counsel) ("The Special Counsel has not yet filed a complaint for disciplinary action . . ."); Office of the Special Counsel, *Report to the Chairwoman, Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service for the Period April 1, 1981 to March 31, 1982* at 4-5 (five complaints filed, four involving violations of the Hatch Act and one involving a violation of the nepotism rule). Thus, since the statutory authority has not been used in whistleblowing cases, it has little, if any, deterrent effect.

III. Denial of a *Bivens* Remedy for Federal Employees Will Interfere with Effective Exercise of the Congressional Functions of Oversight and Investigation of the Executive Branch

This Court has long recognized that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain* v. *Daugherty*, 273 U.S. 135, 175 (1927); *accord*, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504 (1975). Thus, "the power of the Congress to conduct investigations is inherent in the legislative process." *Watkins* v. *United States*, 354 U.S. 178, 187 (1957). The scope of this power of inquiry "is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States*, 360 U.S. 109, 111 (1959).

This Court has also recognized that in the frequent cases where the Congress does not have the necessary information for effective legislation, it must often rely on employees of the Executive branch who have the requisite information. *See McGrain* v. *Daugherty*, *supra*, 273 U.S. at 175. In particular, "[f]ederal employees are often the source of information about agency operation suppressed by their superiors." [24] If these federal employees do not inform Congress and the public of these agency operations, it is unlikely that these situations will ever be made public.[25] Thus, it is beyond question that "whistle-

---

[24] Staff of Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption* 40 (Comm. Print 1978).

[25] *See Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, Hearings Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess., 860 (1978) (statement of Senator Patrick J. Leahy).

blowers provide valuable assistance to Congress in its fulfillment of its oversight responsibilities." [26]

The comments of petitioner Bush to the media which precipitated the adverse actions against him by his superiors involved an issue of public importance—namely, the possible waste of government funds in a make-work position. This is the type of information which Congress needs to carry out its oversight functions and assure productivity of the federal work force, but can only obtain from individual employees like petitioner. Denial of a *Bivens* remedy will chill the flow of this necessary information to Congress.

Furthermore, the issue of an implied cause of action under the First Amendment has significance in many factual contexts other than this case. For example, denial of a *Bivens* remedy may permit high officials of the Executive branch to fire, with impunity, a federal employee who testified truthfully before Congress,[27] particularly since the civil service remedies do not authorize disciplinary action against presidential appointees. 5 U.S.C. § 1206(g)(2). Reinstatement of the wrongfully fired employee provides no deterrent in such a situation because the individual offender cannot be penalized even if the Special Counsel has the will.

In summary, denial of a *Bivens* remedy in this case is not only contrary to this Court's decisions, unsupported by any persuasive justification, and at odds with congressional intent, but it has the potential to interfere drastically with the oversight and investigative functions of Congress.

---

[26] *Id.* at 857 (statement of Senator Abraham Ribicoff).

[27] *Cf.* Harlow v. Fitzgerald, *supra*, 102 S. Ct. 2727.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should reverse the decision below, and, in so doing, declare that a federal employee does have an implied cause of action for damages under the First Amendment when that employee is the victim of a constitutional violation.

Respectfully submitted,

HOGAN & HARTSON

By: _____
JOHN C. KEENEY, JR.
(Counsel of Record)
JOSEPH M. HASSETT
NELL HOFFMAN

HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-5750

Counsel for *Amicus Curiae* Representative Patricia Schroeder, et al.

Of Counsel:

PETER RAVEN-HANSEN
The National Law Center
George Washington University
Washington, D.C. 20052
(202) 676-8171

Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,

v.

WILLIAM R. LUCAS,
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Asst. Attorney General

WILLIAM KANTER
WENDY KEATS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-3355
Counsel for Respondent

WILLIAM HARVEY ELROD, JR.
205 Holly St., N.E.
Decatur, AL 35601
(205) 355-3731
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1981
CERTIORARI GRANTED JUNE 28, 1982

TABLE OF CONTENTS

	Page
Relevant Docket Entries in Courts Below	1
Summons, Filed June 24, 1976	3
Plaintiff's Complaint, Caption and Count 4 only, Filed June 24, 1976	4
Defendant's Petition for Removal, Filed July 9, 1976	8
Defendant's Notice of Filing of Petition for Removal, Filed July 9, 1976	11
Defendant's Motion to Dismiss, or in the Alternative for Summary Judgment, with Affidavits of Defendant and Groo, Filed September 3, 1976	12
Plaintiff's Consolidated Interim Response to Defendant's Motion for Summary Judgment and Motion for Continuance, Filed September 27, 1976	23
District Court's Order Striking Interrogatories, Filed September 28, 1976	37
Deposition of Defendant, Filed November 2, 1976	38
Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment, with Affidavit of Ball, Filed November 3, 1976	82
Affidavits of Groo, Shepherd & Jones in Support of Motion for Summary Judgment, Filed December 14, 1976	87
District Court's Order Granting Summary Judgment, Filed February 7, 1977	95
Notice of Appeal, Filed March 8, 1977	96

NOTE AS TO LOCATION OF ITEMS PREVIOUSLY REPRODUCED IN PETITION FOR WRIT OF CERTIORARI

Item	Petition Page No.
United States Civil Service Commission Federal Employee Appeals Authority Decision, No. AT725B60394, dated 12 August 1976	e-1
United States District Court, Northern Dist. of Alabama, Memorandum of Opinion, dated 4 February 1977 .	d-2
United States Civil Service Commission Appeals Review Board Decision, dated 14 July 1978	f-1
United States Civil Service Commissioners' Denial, dated 10 October 1978, of NASA's Request for Reopening of Appeals Review Board determination	g-1
United States Court of Appeals for the Fifth Circuit's original decision, dated 12 July 1979	c1-1
United States Court of Appeals for the Fifth Circuit's Order, dated 4 October 1979, denying rehearing...	c4-1
United States Court of Appeals for the Fifth Circuit's Decision on remand, dated 12 June 1981	a-1

No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,

v.

WILLIAM R. LUCAS,
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

In The United States District Court For The Northern District Of Alabama

Date	Proceedings
July 9, 1976	Petition for Removal of this cause from Madison Cir. Ct., Their #76-6-696, to this Court, with copy of original summons/complaint attached - filed
July 9, 1976	Notice by deft. Of Filing Petition For Removal - filed - cs
Sept. 3, 1976	Motion of deft., To Dismiss or in the alt. Summary Judgment - filed - cs see 2/7/77 order

Sept. 27, 1976	Response by plff to defendant's motion for summary judgment and motion for continuance or other relief under Subdivision (f) of Rule 56 of FRCP, filed, cs
Sept. 28, 1976	Order, in consideration that pltf's. interrog. are unduly burdensome for purpose of the pending s/j motion, striking same ex mero motu both & directing that pltf. may take deft's. deposition, with restraint that pltf's. examination be concluded within 3 hrs., subject to deft's. answers being responsive & straight forward filed & entered (Pointer) - cm
Nov. 2, 1976	Deposition of Dr. Wlm. R. Lucas taken on behalf of pltf. on 10/20/76 filed C. Frank McMillan, rptr.
Nov. 3, 1976	Response (Supplemental) of pltf. To Motion For Summary Judgment by deft. - filed - cs lrc
Nov. 3, 1976	Affidavit of Leslie W. Ball - filed lrc
Dec. 14, 1976	Affidavits of Elmer S. Groo, James T. Shepherd & Joseph M. Jones in support of motion for summary judgment - filed - cs lrc dated 2/4/77
Feb. 7, 1976	Order, dated 2/4/77, that there being no genuine issues as to any material fact, granting summary judgment in favor of deft.; taxing costs against pltf. - filed & entered (Pointer) - cm lrc

In The United States Court Of Appeals, For The Fifth Circuit

[July 12, 1979	Judgment Affirming District Court judgment, w/opinion]
Oct. 4, 1979	Order denying rehearing en banc [,] w/o poll
Oct. 1, 1980	Supplemental brief for appellant
Oct. 8, 1980	Supplemental brief for appellee
June 12, 1981	[On remand, judgment reaffirming original decision of this court and affirming judgment of district court, w/opinion]

IN THE CIRCUIT COURT FOR MADISON COUNTY, ALABAMA

Civil Action No. 76-6-696

William C. Bush,
Plaintiff,

v.

William R. Lucas,
Defendant.

SUMMONS

To any Sheriff or any other person authorized by Rule 4(a) (3) of the Alabama Rules of Civil Procedure to effect service in the State of Alabama:

You are hereby commanded to serve this summons and a copy of the complaint in this action upon defendant William R. Lucas, 6805 Criner Road, S. E., Huntsville, Alabama, or, if your deputy can gain admittance at MSFC, at Building 4200, George C. Marshall Space Flight Center.

Each defendant is required to serve a copy of a written answer to the complaint upon Harvey Elrod, attorney of record for the plaintiff, whose address is P. O. Box 632, Decatur, Alabama 35602, within thirty (30) days after service of this summons, excluding the day of service of the summons, and to file the original of such written answer with the Clerk of this Court at the time of service of the answer upon the attorney of record for the plaintiff or within a reasonable time thereafter. If any defendant fails to do so, a judgment by default may be entered against that defendant for the relief demanded in the complaint.

Dated this the _____ day
of _____, 1976.

_____

Clerk of Court

IN THE CIRCUIT COURT FOR MADISON COUNTY, ALABAMA

_____

[Title Omitted In Printing]

COMPLAINT

[Counts One Through Three Omitted In Printing.]

Count Four

1. Plaintiff now is and for a number of years has been an aerospace engineer in the civil service of the United States of America. For several years, he has been employed at Marshall Space Flight Center.

2. Between the dates of 1 May 1975 and 25 November 1975, defendant, while purporting to act in his official capacity as Director of the George C. Marshall Space Flight Center, con-

spired with divers persons, including among others, one John S. Potate, one Gustav Albert Knoll, one Ronald K. Olsen, one Miles J. Miniter, one Robert G. Eudy and one J. E. Kingsbury, both to deprive plaintiff of his constitutional rights of freedom of speech and of petition to Congress and to reduce plaintiff two General Schedule grades in the civil service, with attendant reduction in salary of approximately Ten Thousand Dollars ($10,000.00) a year.

2. Such conspiracy was entered into and pursued with the common intent of stifling fair comment by plaintiff, and others similarly situated, upon wasteful personnel and management practices at George C. Marshall Space Flight Center, all to the end that the defendant and his co-conspirators might continue their wasteful practices at George C. Marshall Space Flight Center without ever having to account for the same.

3. The said conspiracy was entered into either at George C. Marshall Space Flight Center or at some one or more other places within the territorial confines of Madison County, Alabama. It was carried into execution at George C. Marshall Space Flight Center.

4. In pursuance of the said conspiracy, defendant or one or more of his co-conspirators caused a specious investigation to be made among certain personnel who were co-employees of plaintiff at the said George C. Marshall Space Flight Center; the defendant, or one or more of his co-conspirators, caused the said specious "investigation" to be made for the alleged purpose of independently ascertaining whether plaintiff's position was, as he then and has since contended, substantively meaningless and of no benefit to the taxpayers of the United States of America, but plaintiff is informed and believes that the said so-called investigation was in truth and in fact conceived and executed for the purpose of concocting charges upon which plaintiff might be demoted with colorable justification; that, after

such alleged "investigation," defendant or one or more of his co-conspirators caused the co-conspirator Kingsbury formally to give plaintiff notice of the proposed removal of plaintiff from the civil service on charges concocted by one or more of the co-conspirators, acting always in concert with or at the instance or procurement of defendant; that, after the said notice was given plaintiff, defendant and one or more of his co-conspirators sought to frustrate, nullify and render meaningless the rights accorded plaintiff under §14 of the Veterans' Preference Act, as amended (5 U.S.C.A. §7512) by providing defendant as the officer to whom plaintiff's oral and personal reply to the charges would be delivered and who would make the decision as to whether the charges were sustained; that, pursuant to the said conspiracy, defendant, while finding that certain of the more extravagant of the charges were not sustained, did find that certain of the said charges were sustained, and did demote plaintiff two General Schedule grades; that, in the ensuing and yet pending course of appeal to the United States Civil Service Commission, defendant and one or more of his co-conspirators have sought to hamstring plaintiff in and about his efforts to prosecute the said appeal; and that, as a direct and proximate result and consequence of the said conspiracy, plaintiff already has been deprived of several thousand dollars of salary to which he was entitled if defendant and his co-conspirators had given plaintiff meaningful work rather than demoting him for asking for meaningful work, and plaintiff further has been put to great expense by way of legal fees and other expenses and outlays necessarily incurred by him in attempting to obtain redress through administrative channels.

5. Plaintiff has set forth the preceding Paragraph 4 by way of inducement merely; he does not invoke, or seek to invoke, the jurisdiction of this state court for purposes of obtaining reinstatement or other remedies available to him either through appeal to the Civil Service Commission or by ultimate resort to

the United States courts. He does invoke the jurisdiction this court, which he is advised is concurrent, as to such subject matter, with that of the United States District Court for the Northern District of Alabama, for purposes of obtaining redress for the tort committed by defendant and his co-conspirators in initially violating rights under the First Amendment to the Constitution of the United States of America.

6. Said violations have consisted in the efforts of defendant and his co-conspirators, in pursuance of their aforesaid common intent of continuing waste of public funds and forces, without accounting therefor, to squelch plaintiff in his letting members of Congress, members of the press and some few members of the public know of the waste which he observed to be rampant at Marshall Space Flight Center. For having so expressed himself, plaintiff has been punished by defendant and his co-conspirators by being demoted as aforesaid and by being denounced as, in effect, a liar in advance of any hearing upon the charges ultimately made against plaintiff.

WHEREFORE, plaintiff demands judgment against defendant for the sum of ONE MILLION DOLLARS ($1,000,000.00) and costs.

/s/ Harvey Elrod
P. O. Box 632
Decatur, Ala. 35602
(Tel. No. [205] 355-3731)
Attorney for plaintiff

HUTSON, ELROD, EDWARDS
& BELSER
140 Citizens Industrial Bank
Bldg., P. O. Box 632
Decatur, Alabama 35602

[Service directions omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

• • •

Civil Act No.: CA 76 P0962NE

[Title Omitted In Printing.]

PETITION FOR REMOVAL OF A CIVIL ACTION

Petitioner, William R. Lucas, by his attorney, the United States Attorney for the Northern District of Alabama, respectfully petitions the Court as follows:

1. Petitioner is the defendant in the Civil Action now pending in the Circuit Court of Madison County, in the State of Alabama, No. 76-6-696 entitled

WILLIAM C. BUSH,
Plaintiff,

vs.

WILLIAM R. LUCAS,
Defendant,

and that trial has not yet been had therein.

2. That the above-entitled action was commenced against the petitioner on June 24, 1976, by service of process and a copy of the Complaint on the petitioner on July 2, 1976. Copies of all process and pleadings served on petitioner are attached hereto as Exhibits A and B.

3. This Petition for Removal is brought pursuant to 28 U.S.C. 1442(a)(1) and 1446, said action in the State Court commenced against petitioner being a civil action in connection with acts allegedly done by him under color of his office as the Director of George C. Marshall Space Flight Center, National Aeronautics and Space Administration.

4. The petitioner's actions arose from the performance of the official duties of the petitioner's aforesaid office in that on June 25, 1975, a press conference in the commemoration of the Marshall Space Flight Center's fifteenth anniversary was held in the Center's headquarters building, Huntsville, Alabama. At the conclusion of said press conference, the petitioner, in response to a question posed by a Huntsville television station reporter, replied to the query concerning certain allegations made by the plaintiff publicly that said public utterances of the plaintiff after investigation of same were without a basis in fact. The comments of the petitioner were made at an official press conference by the Director of the Marshall Space Flight Center in his capacity as said Director and completely within the scope of his employment.

5. Petitioner files herewith a bond of good and sufficient surety conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that this case was not removable or was improperly removed.

WHEREFORE, this action, now pending in the Circuit Court of Madison County, is properly removed therefrom to the Court, pursuant to 28 U.S.C. 1442(a)(1).

WAYMAN G. SHERRER
United States Attorney

BY: /s/ HENRY I. FROHSIN
Assistant United States
Attorney

Verification

The undersigned Assistant United States Attorney for the Northern District of Alabama, pursuant to the provisions of 28 U.S.C. 1446(a) and by virtue of the authority vested in him by the Attorney General of the United States, hereby verifies that he has read the foregoing Petition and the attachments thereto, and upon the basis of the information now available to him with respect to the incident referred to therein, he is of the opinion that the petitioner, at the time alleged in the Complaint, was an officer of the United States acting under color of his office and thereby within the provisions of 28 U.S.C. 1442(a)(1).

DATED: this 8th day of July, 1976.

/s/ HENRY I. FROHSIN
Assistant United States
Attorney

Subscribed and sworn to before
me on this 8th day of July, 1976.

/s/ Sue M. Elliott
NOTARY PUBLIC

My Commission expires: 8-13-79

[Certificate of Service omitted in printing.]

[Exhibits A and B to the Petition for Removal were copies of the summons and complaint set out at pp. 3-7, ante., in accordance with Rule 30.1.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

* * * * * * *

[Title Omitted In Printing.]

NOTICE OF FILING OF PETITION FOR REMOVAL OF A CIVIL ACTION

TO: Harvey Elrod, Esq.
Hutson, Elrod, Edwards & Belser
Attorneys for the Plaintiff

Please take notice that on July 9, 1976, William R. Lucas filed with the Clerk of the United States District Court for the Northern District of Alabama a Petition for Removal of the above-entitled action. A copy of said Petition and Removal Bond is attached hereto.

WAYMAN G. SHERRER
United States Attorney

/s/ HENRY I. FROHSIN
Assistant United States
Attorney

[Certificate of Service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

* * * * * * *

[Title Omitted In Printing.]

MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Comes now the defendant, Dr. William R. Lucas, by and through his attorneys, and moves to dismiss the complaint filed heretofore in the above-styled cause, or in the alternative, for summary judgment; and as grounds therefor, says:

1. The complaint fails to state a claim upon which relief can be granted.

2. Based upon the affidavits of Dr. William R. Lucas, and Elmer S. Groo, attached hereto and incorporated by reference, it affirmatively appears that the defendant was acting at all times, made the subject of the complaint herein, in an official capacity as Director of the National Aeronautics and Space Administration, George C. Marshall Space Flight Center, and thereby is protected by the "Doctrine of Official Immunity." *Barr* v. *Mateo [sic],* 360 U.S. 564.

3. The communications made the subject of the complaint were "within the outer perimeter" of the defendant's duties and are, thereby, absolutely privileged. *Barr* v. *Mateo [sic], Supra.*

4. Based upon the aforesaid affidavits and the pleadings herein, there are no genuine issues of material fact and the defendant is entitled to judgment as a matter of law.

WHEREFORE, the defendant respectfully prays for an order dismissing the complaint with prejudice, or in the alternative,

for summary judgment, together with costs and any further and different relief as the Court deems just and proper.

WAYMAN G. SHERRER
United States Attorney

/s/ HENRY I. FROHSIN
First Assistant U.S. Attorney

[Certificate of Service omitted in printing.]

AFFIDAVIT
OF
WILLIAM R. LUCAS

I, WILLIAM R. LUCAS, residing at 6805 Criner Road, S. E., Huntsville, Alabama, am Director of the National Aeronautics and Space Administration's George C. Marshall Space Flight Center located near Huntsville in north Alabama.

I have read and am familiar with allegations contained in the complaint in Civil Action No. 76-6-696, which was filed by Mr. William C. Bush in the Circuit Court for Madison County, Alabama, on June 24, 1976, and which names me as defendant.

My official duties, both now and at all times covered by the events alleged in the Bush complaint, make me "totally responsible for all facets of the Center's operations." I am also "charged with the responsibility for the success of those missions and programs assigned" to the Center; and I am "authorized to take such action as is necessary to carry out this responsibility." A copy of my official job description is attached.

In an article which appeared in the *Huntsville Times* on May 15, 1975, Mr. Bush, an individual employed as a GS-14 engineer

at the Marshall Space Flight Center, was quoted as having made statements highly critical of the Center. Among other things, he was quoted as having said that his job description was written improperly "to support the GS-15 branch chief," and was a "falsehood, a travesty and worthless"; and that he was reporting what "appears to be a fraudulent use of Federal funds." That article was the basis for a May 17, 1976, National Press Release which appeared in a number of newspapers in various parts of the country. Mr. Bush also appeared on local Huntsville television on May 15, June 10, and June 29, 1975, where he made additional allegations critical of the Center. On one or more of those occasions, Mr. Bush's comments included some to the effect that he did not have enough meaningful work to keep him busy; that he spent no more than thirty minutes to an hour each day on official work; and that his job was unnecessary and should be abolished to save the taxpayers' money.

As Center Director, I was greatly disturbed by these allegations, as well as the fact that they came to my attention initially through newspaper articles and television broadcasts. Consequently, I took the following action: First, I asked my subordinate managers with cognizance over Mr. Bush's function to look into the matter and report to me; Secondly, I requested that an independent investigation into Mr. Bush's allegations be conducted by the NASA Inspections Division.

As a result of both investigations, I was assured that Mr. Bush did have a valid job description; that the function for which he was responsible was necessary to fulfill the Center's missions; that he did have enough meaningful work to keep him busy; and that, in fact, he had been putting in a reasonable day's work.

On June 25, 1975, a press conference in commemoration of the Marshall Space Flight Center's fifteenth anniversary was held in the Tenth Floor Conference Room of Building 4200 (the Center's Headquarters' Building). At the end of that press con-

ference, I was interviewed by a reporter from Huntsville Television Station WHNT-TV, who asked me several questions concerning Mr. Bush's public allegations. Based upon the assurances I had received from the above-mentioned investigations, I responded that, as to Mr. Bush's statement to the effect that he had no meaningful work to do, I had had that statement investigated and that "I can say unequivocally that such a statement has no basis in fact."

My comment was made at an official press conference held at the Marshall Space Flight Center where I appeared as Director of the Center, and involved a matter completely within the scope of my employment as Center Director. I believed the statement to be true when I made it, and I still believe it is true. I bore Mr. Bush no malice at that time, and still feel none toward him. In making the statement my sole intention was, on behalf of the Center, to set the record straight. There was no intent to "defame" Mr. Bush.

Because of Mr. Bush's many public remarks which were misleading and often false, and which brought discredit to the Government service, he was notified by letter dated August 1, 1975, from Mr. James E. Kingsbury, Director of the Center's Science and Engineering Directorate, of a proposed adverse action to remove him from Center employment. As Center Director, I later considered that proposed adverse action; determined that some of the reasons specified in reasons which were sustained were sufficient to warrant Mr. Bush's removal in order to promote the efficiency of the service. However, because this was Mr. Bush's first offense of record, I decided to reduce the penalty to a reduction-in-grade from GS-14 to GS-12, and to transfer him to another Center organization. I notified Mr. Bush of this decision by letter dated November 25, 1975. Mr. Bush appealed that decision to, and has been accorded a hearing on his appeal by, the United States Civil Service Commission. The Commission's decision on that appeal is pending.

As Director of the Marshall Space Flight Center, I have never "conspired with" anyone to perform any illegal or improper act or to accomplish any illegal or improper end, and certainly not to deprive Mr. Bush, or any other employee, of any freedom or right, or to stifle any "fair comment." However, I do firmly believe that Mr. Bush — as well as any other Center employee, including me — should be held responsible for false and misleading statements which tend to bring discredit upon the Government service.

The investigations I caused to be made into Mr. Bush's allegations, my consideration of the proposed adverse action against him, and my decision to reduce his penalty from removal to reduction-in-grade, were all undertaken in my official capacity as Director of the Marshall Space Flight Center and were fully within the scope of my employment as Center Director.

In conclusion, my allegedly defamatory statement which is the basis of Counts 1, 2 and 3 of the Bush complaint, as well as my actions complained of in Count 4, were made entirely within the scope of my official duties as Director of the Marshall Space Flight Center. Contrary to the Bush complaint, my statement is true to the best of my knowledge and belief, and that statement was made and all my actions were taken in complete good faith rather than for reasons of malice.

/s/ WILLIAM R. LUCAS

COUNTY OF MADISON
STATE OF ALABAMA

Before me, Dorothy J. Davis, Notary Public for the State of Alabama at large, appeared William R. Lucas, who is known to me, and who being first duly sworn, declares that the foregoing statement is true and correct to the best of his knowledge and belief on this 29th day of June, 1976.

/s/ DOROTHY J. DAVIS
Notary Public
State of Alabama at Large

My Commission expires Jan. 3, 1977

---

* * * * * * * *

POSITION DESCRIPTION

* * * * * * * *

2. Official headquarters: Huntsville Ala.

* * * * * * * *

4. Agency position No.: PL-313/(PL-V-012).

5. C.S.C. Classification No.: PL-V-012

6. Date of Certification: 7-3-74

7. Date received from C.S.C.: 7-17-74

8. Classification Action

* * * * * * * *

Class Title of Position: AST-Executive Management Director, NASA George C. Marshall Space Flight Center.

Class, Service: GS; Series: 801; Grade PL-313

* * * * * * * *

9. Organizational title of position: Director

10. Name of employee: William R. Lucas

11. Department, agency, or establishment: National Aeronautics & Space Admin.

a. First subdivision: Associate Administrator for Center Operations.

b. Second subdivision: George C. Marshall Space Flight Center.

* * * * * * * *

13. This is a complete and accurate description of the duties and responsibilities of this position:

George M. Low (signed) June 19, 1974

* * * * * * * *

Title: Associate Administrator for Center operations.

* * * * * * * *

15. Certification by department, agency or establishment:

Lyle A. Metcalfe (signed) June 21, 1974

Title: Director of Personnel, NASA.

16. Description of duties and responsibilities:

Summary

This position serves as Director of the George C. Marshall Space Flight Center (MSFC) in Huntsville, Alabama. MSFC is one of the major NASA field centers and is charged with the responsibility for research, development and advanced study programs associated with large launch vehicles, space transportation systems and selected payloads, together with the related support equipment and facilities. The center is made up of approximately 4,500 employees of which approximately one-third are scientific and professional personnel. The center has significant satellite facilities in the Michoud Assembly Facility at New Orleans. [Phrase deleted in original.] The Director is totally responsible for all facets of the center's operations and is charged

with the responsibility for the success of those missions and programs assigned. He is authorized to take such action as is necessary to carry out this responsibility.

Reports to the NASA Associate Administrator for Center Operations, who establishes specific accountability relationships. The Center Director is subject to such broad and overall guidance as laws, regulations and general NASA policy guidance.

Within this general area of assignment, the Center Director performs the following duties:

1. Formulates center policies and programs, and executes the Agency policies and programs assigned to the center by the National Aeronautics and Space Administration.

    a. Plans and prosecutes the research and development program established by NASA for the center.

    b. Reviews the field of space science, considers the constantly changing goals and requirements of space flight and research, and makes recommendations as to additional programs for the center.

    c. Contacts the Headquarters program directors and the Associate Administrator and other NASA Headquarters staff explaining projects and programs proposed in the center in detail and making recommendations with respect to approving or rejecting proposals initiated outside the center.

    d. Directs liaison work with the technical committee and sub-committees, exchanges ideas and information with representatives from other centers, representatives of private industry and the military services.

    e. Approves or disapproves proposed methods of achieving research and development objectives, re-

quiring outstanding ability to evaluate proposed research and development projects and investigations through an understanding on the highest scientific level, of research and development projects being performed or proposed. Frequently such projects are not only unprecedented, but are unique within the total area of space flight vehicle research and development.

f. Upon receipt of broad program authorization from NASA Headquarters, directs the planning of research and development program, taking into consideration the recommendations of the directors of the technical and program elements of MSFC. Assigns projects to appropriate organizational element directors, basing determination of assignment upon nature of project and particular fields of research and development for which each is responsible.

2. Serves as a consultant and advisor to top echelon government officials on all phases of research and development of long range missiles and space vehicles. The program success involves continual study and exploration into the frontiers of several fields of physical science including physiochemistry, metallurgy, physics and electronics. The incumbent's recommendations and advice in these fields are eagerly sought and accepted not only by his associates and subordinates but by industrial and government scientists and executives engaged in similar activities.

3. Establishes the basic organization of the center required to administer, serve and meet the requirements of the research and development program. Directs, supervises and coordinates the efforts of the major organizational directors in the various technical projects and programs of the center.

4. Represents the Marshall Space Flight Center and NASA in conferences with representatives of the military service, other Government agencies, private industry, universities, research institutions, and professional societies. As Center Director represents the National Aeronautics and Space Administration to community leaders in the geographic areas in which the center operates. Accepts speaking engagements and encourages staff members in this regard.

5. Performs the foregoing duties in conjunction with, and pursuant to the objectives of, the attached functional assignments of the major organizational elements of the Marshall Space Flight Center.

AFFIDAVIT
OF
ELMER S. GROO

I, ELMER S. GROO, am Associate Administrator for Center Operations, National Aeronautics and Space Administration.

I have read and am familiar with allegations contained in the complaint in Civil Action No. 76-6-696, which was filed by Mr. William C. Bush in the Circuit Court for Madison County, Alabama, on June 24, 1976, and which names Dr. William R. Lucas as defendant. I have also read and am familiar with the Affidavit signed by Dr. Lucas which he proposes to submit to the Department of Justice with a letter requesting that the Department represent him in this lawsuit.

My official duties, both now and at all times covered by the events alleged in the Bush complaint, make me the supervisor of Dr. Lucas. I am aware of the statement made by Dr. Lucas to a television news reporter on June 25, 1975, concerning allegations previously made by Mr. Bush. In accordance with Dr. Lucas' official job description, and with specific reference to

NASA Policy Directive 1380.4, that statement was clearly made within the scope of Dr. Lucas' official employment as Director of the Marshall Space Flight Center.

Mr. Bush's public allegations about improprieties at the Marshall Space Flight Center covered matters within Dr. Lucas' jurisdiction as Center Director; and his causing investigations to be made into those allegations was clearly within his scope of employment.

Furthermore, I have no reason to question Dr. Lucas' statement that all his alleged actions which form the basis of the Bush complaint were taken in good faith rather than for reasons of malice.

/s/ ELMER S. GROO

Sworn to and subscribed before me this 30th day of June 1976.

/s/ Dorothy J. Jackson
Notary Public

My commission expires: January 31, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

* * * * * * * *

[Title Omitted In Printing.]

PLAINTIFF'S CONSOLIDATED: (1) INTERIM RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; AND (2) MOTION FOR CONTINUANCE OR OTHER RELIEF UNDER SUB-DIVISION (f) OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A.

For interim response to the summary-judgment aspect of that certain alternative motion to dismiss or for summary judgment lately served by the defendant in the above-entitled action, plaintiff says as follows:

1. Pared to admissible form, the defendant's moving papers do not disclose that the defendant is entitled to a judgment as a matter of law.

* * * * * * * *

3. The defendant's moving papers do not disclose any factual basis for a threshold determination, as a matter of law, that the defendant did not engage in the wrongdoing averred in Count Four of the complaint.

4. As to the wrongdoing averred in Count Four of the complaint, defendant's motion for summary judgment and accompanying affidavits proffer only generalized denials of wrongdoing.

5. Except for conclusions and argumentative assertions of partisan affiants, defendant's moving papers do not disclose

that, as of the time of the wrongdoing averred in the several counts of the complaint in this action, the defendant was in fact engaged in the performance of any official duty.

* * * * * * * *

7. To grant defendant's motion for summary judgment in the present posture of the above-entitled action would be to foreclose all inquiry into the matter of malice on defendant's part even though no factually sufficient basis had been established for a determination or finding that, in and about the doing of the acts complained of, defendant enjoyed any absolute immunity.

8. In and by his affidavit in support of his motion for summary judgment, defendant denies malice and yet would have the court foreclose any further inquiry on the basis of such ex cathedra denial alone.

9. Defendant's moving papers do not afford sufficient factual basis for *either:* (a) a determination that, as of the time of his acts complained of in this action, the defendant was the incumbent of a position within the protection of the doctrine enunciated by a plurality of the sitting justices in *Barr* v. *Matteo,* the case referred to in the body of defendant's said motion; *or,* (b), a determination that, if the defendant was the incumbent of such a position, he was engaged in the discharge of the duties of such position at the time of the mentioned acts on his part; *or* (c), a determination that the circumstances under which the acts were done were sufficient to render those acts part of any official duty on defendant's part.

10. To grant defendant's motion for summary judgment at this juncture would forestall inquiry into defendant's state of mind without any sufficient factual showing that his position or office was such, at the time of the acts giving rise to the present claims, as to render his state of mind immaterial to the proper disposition of the claims.

11. The affidavits of defendant and of his supervisor Groo, together, do not set forth facts, as distinguished from conclusions and argument, sufficient to show that defendant's duties were such so to confer absolute immunity upon him with respect to the subject matter of the present suit; and the defendant's position description, referred to by both affiants in support of defendant's motion, is itself both quite general and the work of one or more experts as to whose qualifications defendant vouchsafes no information.

12. As more fully appears by the affidavits, interrogatories, copies of documents and copies of correspondence accompanying this interim response, plaintiff challenges the credibility of defendant's affiants and defendant's position record alike.

13. The defendant did not attach a copy of NASA Policy Directive 1380.4, referred to by the affiant Groo, to the copy of defendant's alternative motion served upon counsel for plaintiff.

14. Defendant's moving papers do not disclose that there is no genuine issue as to any material fact.

15. For the reasons hereinabove and hereinafter set forth, defendant's motion for summary judgment is, at best, premature if not, at worst, sham and contumelious.

B.

As more fully appears from the attached affidavits, respectively marked Exhibit "A" and Exhibit "B" hereto and herewith incorporated herein the same as though fully set out herein, plaintiff can not yet present by affidavit certain of the facts essential to a full justification of plaintiff's opposition to defendant's pending motion for summary judgment, assuming that the motion neither falls of its, and its accompanying affidavits', own weight nor floats off for lack of weight.

WHEREFORE, plaintiff moves the court, mainly in the alternative, as follows: (a) presently to deny defendant's motion for summary judgment; or, (b), to order a continuance of the hearing on the said motion pending plaintiff's completion of the course of discovery already commenced in and by those certain interrogatories copies of which, as transmitted to counsel for defendant and to the clerk, appear as Exhibits "C" and "D" to this consolidated response and motion; or (c), make such other order as, in the premises, is just; but, (d), in any event, to grant plaintiff leave to continue the course of discovery commenced in and by the said interrogatories and proposed to be expanded in the light of the answers to the same.

/s/ Harvey Elrod
P. O. Box 632
Decatur, AL 35602
(Tel. No. (205) 355-3731)
Attorney for plaintiff

HUTSON, ELROD, EDWARDS & BELSER
140 Citizens Industrial Bank Building
205 Holly Street
Decatur, AL 35602
Of counsel

[Certificate of service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

* * * * * * *

[Title Omitted In Printing.]

AFFIDAVIT OF HARVEY ELROD, ATTORNEY OF RECORD FOR PLAINTIFF, TO ACCOMPANY PLAINTIFF'S CONSOLIDATED RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, ETC.

STATE OF ALABAMA
MORGAN COUNTY

Before the undersigned authority in and for said county in said state, this day personally appeared Harvey Elrod, who, being first duly sworn, did depose and say as follows:

"My name is Harvey Elrod. I am the attorney of record for the plaintiff in the above-entitled action.

"I commenced that action by filing a complaint in the Circuit Court of Madison County, Alabama. I did that on or about 24 June 1976.

"On or about 7 July 1976, I received a telephone call from the present attorney of record for the defendant in the above-entitled action. After making some inquiry as to why I had sued Mr. Lucas, Mr. Frohsin stated, in the course of our telephone conversation of 7 July 1976 or thereabout, that he was going to have to have the case removed to federal court and that he thereafter would invoke *Barr* v. *Matteo.* I then told Mr. Frohsin, in effect if not in very words, first, that I certainly did not mind having the case removed to this court and, second, to go ahead and invoke *Barr* v. *Matteo,* by motion for summary judgment or otherwise, but that I would have to make some discovery with respect to any such motion.

"As more fully appears from the records of this court in the above-entitled action, Mr. Frohsin did effect the removal of the case to this court on or about 9 July 1976.

"On 14 July 1976, I received a copy of the defendant's motion for a sixty-day extension of time within which to answer the complaint in this action. One of the grounds of that motion reads as follows:

'2. In order for the United States Attorney to effectively defend the action it is required that investigation be undertaken into the merits.

The court granted the requested extension without any objection on my part. I wanted the United States Attorney really to investigate the merits of the suit before answering the complaint.

* * * * * * * *

"In view of the foregoing, and of my several other commitments, it is my opinion that plaintiff will need three or four months in which to complete the discovery requisite to meet such subsequent, and formally sufficient, motion for summary judgment as the defendant may interpose in this action."

Further affiant saith not.

/s/ Harvey Elrod

Sworn to and subscribed
before me, this 23d day of
September 1976.

/s/ Mary Frances Walker
Notary Public, State of Alabama at Large.

* * * * * * * *

Exhibit A to Plaintiff's Response, etc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

* * * * * * *

[Title Omitted In Printing.]

PLAINTIFF'S AFFIDAVIT TO ACCOMPANY CONSOLIDATED INTERIM RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, ETC.

STATE OF ALABAMA
MORGAN COUNTY

Before the undersigned authority in and for said county in said state, this day personally appeared William C. Bush, who, being first duly sworn, did depose and say as follows, namely:

"My name is William Christopher Bush. I ordinarily use only my first name, middle initial and surname. I am the plaintiff in the above-entitled action. I employed Mr. Harvey Elrod to commence that action.

"Beginning on Sunday, 5 September 1976, Mr. Elrod and I have spent a number of hours in preparing interrogatories to the defendant in that action. I have observed that Mr. Elrod has tied substantially, if not entirely, all those interrogatories to statements set forth in affidavits accompanying what I understand to be defendant's motion for summary judgment, a judgment without trial, in that action.

"I have read those affidavits. I now address the affidavit of the defendant. I do so both as a litigant and as an aerospace engineer with degrees in civil engineering and business administration and twenty-seven years' experience in engineering and management. I also am a veteran of World War II and the Korean Conflict, and, therefore, am entitled to the benefits of

the Veterans' Preference Act of 1944, as amended. (I mention my being a veteran only because it affects my status as a Civil Service employee.)

"Although I find that, as he says, his position description appears to make him "'totally responsible for all facets of the Center's operations,'" I do not know just what specific duties that covers. I do know, both from my own personal experience in Position No. 19343-5 at the George C. Marshall Space Flight Center and from data coming to light during the course of a hearing held at George C. Marshall Space Flight Center in early June of this year and at which defendant testified, that position records do not necessarily mean much in terms of concrete duties.

"I was assigned to that position in November of 1974. In a short time, I found that there were few, if any, actual duties to correspond to the position description. I took the matter up with management at Marshall Space Flight Center, through the bargaining unit for engineers and scientists employed at that facility. That bargaining unit is called MESA, which is an acronym for Marshall Engineers and Scientists' Association. I also sought to enlist the aid of the Assistant to the Deputy Director for Management at Marshall Space Flight Center. His name is William R. Reynolds. In addition, I asked the chief and the administrative officer of the laboratory to which I was assigned to help see if he could not get the position abolished, in order that I might either: (a) be given a position comparable to the one which I had held before the June 1974 reorganization; or (b) be able, by virtue of the abolishment of Position No. 1934S, to try to take early retirement from Government service—in which I had been engaged some twenty-four years.

"After nothing came of my efforts to obtain help within the shop, so to speak, I did consent to an interview by the then Science Editor of the Huntsville *Times* with respect to my situa-

tion as an aerospace engineer drawing some $32,000.00 a year for occupying a civil service position without any current or—at least to me—forseeable, professional work-content. In the course of that interview, I did tell the Science Editor of the Huntsville *Times* that the official description of my then current position was inaccurate; and that the position description had been written for the purpose of supporting the grade of the GS-15 branch chief. (The position [No. 19343-5], which was written up as justifying GS-14 grade, was one of two such positions in the particular branch.) While I probably did not use the very words which the article attributes to me—or, if I did use them, I did so in the context of appeals to the Civil Service Commission—, the article which the defendant mentions in the fourth paragraph of his aforesaid affidavit did contain the words which he quotes from it in that affidavit. Both in my interview with the Science Editor of the Huntsville *Times* and in the other interviews mentioned in the fourth paragraph of the defendant's aforesaid affidavit, I also said, in substance, if not in very terms, that I did not have enough meaningful work to do and that I probably spent no more than thirty minutes a day on official work, etc., as set forth in the mentioned paragraph of the defendant's affidavit. The statements were true.

* * * * * * *

"With respect to the matter of the defendant's having asked his 'subordinate managers with cognizance over Mr. Bush's function to look into the matter and report to...[the defendant],' as mentioned in the fifth paragraph of the defendant's affidavit, I now say that, in June of this year and while testifying at the hearing to which he refers in the ninth paragraph of his affidavit, the defendant, while opining that Position No. 1934-S did afford viable employment opporunity, was able to specify only rather general conversations between him and, respectively, Mr. Richard G. Smith and Mr. James E. Kingsbury, with respect either to my statements or to the impact

of those statements upon Center operations. The conversation with Mr. Smith, as testified to by the defendant, related only to the matter of the impact of my prior statements. The several conversations with Mr. Kingsbury, as testified to by the defendant at the aforesaid hearing commenced with an informal inquiry directed to Mr. Kingsbury with respect to my claim; an "immediate" response that, to Mr. Kingsbury's knowledge, it was not the case that I had nothing to do; instructions to Mr. Kingsbury to look further into the matter and report back to defendant; an ensuing oral report "within a matter of hours"; and, after "more investigation," interim reports which took the defendant and Mr. Kingsbury no further than a review of my "job description"—the same type item as the "official position description" accompanying the defendant's affidavit—and a discussion of "what Mr. Bush was expected to do."

"In the course of the same hearing at which the defendant testified to the above-noted effect with respect to certain of the matters involved in this action, my counsel was able to secure the reluctant production of parts of an item called *An Evaluation of Personnel Management At The Marshall Space Flight Center*. A copy of those parts comprises Exhibit "E" acompanying this affidavit and the other exhibits to my consolidated interim response and motion with respect to defendant's motion for summary judgment. I prepared such copy from the counterpart which counsel for the MSFC, pursuant to express authorization by NASA and the CSC, provided my counsel at the conclusion of the aforementioned hearing. I am asking my counsel to take appropriate steps to obtain an admission from defendant as to the genuineness of the copy presently made Exhibit "E" to my aforesaid consolidated response and motion.

"As will more fully appear upon inspection of the mentioned Exhibit "E," the defendant was a signatory to, and participated in, the study eventuating in the report. Although the cover sheet indicates that the item speaks as of July, 1975, certain of the

contents of the item disclose the following matters of present pertinence:

(a) that "[t]he working environment at at the Marshall Space Flight Center has been characterized by abnormal conditions, unique within the [National Aeronautics and Space] Agency, since 1967...";

(b) that, as of July 1975, the "relationships and understandings [necessary "to full operational effectiveness"] [had] not developed fully, especially in Science and Engineering [,] where the changes have been most drastic...";

(c) that the Science and Engineering Directorate, to which I was assigned at all material times, "was the major contributor to the Center's low standing in many areas of personnel management, as reflected by survey questionaire results...";

(d) that, as of July 1975, the Marshall Space Flight Center was "pursuing the...restoration of its personnel management program to full effectiveness in all of its aspects...";

(e) that, according to certain personnel program objectives for the fiscal year 1975, as transmitted to the Headquarters of NASA on or about 22 August 1974, Marshall Space Flight Center had undertaken a thorough classification review of all engineers and scientists in Grades-13 and above during that fiscal year, with "the results of that review...[being] implemented concurrent with the reduction in force effective March 15, 1975...";

(f) that, "[u]pon completion of reduction-in-force activities, a survey of all other General Schedule positions was initiated since it was recognized that other grade problems existed, especially in the business professional group...";

(g) that "[t]he work force adjustments during the past eight years...[had] necessitated constant position restructuring to maintain viable organization structure and adjust the skills balance to meeting changing missions...";

(h) that, during the period of retrenchment beginning in 1967 or therabout, "the types of positions needed to cope with changing mission assignments and changing nature of in-house capability varied considerably...";

(i) that, during the mentioned period of retrenchment, "[d]ealing with reduction-in-force related position classification and related problems became an MSFC specialty...";

(j) that, during the period under review in the study (which included fiscal year 1975 as well as other fiscal periods), "[a]ll 11 GS-13 and above engineering position descriptions were refined in the classification survey...";

(k) that "[l]abor management relations during the retrenchment period...[had] been difficult...[with] [t]hree temporary restraining orders hav[ing] been experienced since the first reduction in force in FY68.";

(l) that, according to the results of a survey by questionnaire, and on a composite basis, the Marshall Space Flight Center "ranked the lowest of the NASA Centers on 16 out of the 24 questions" relating to quality of supervision;

(m) that, according to a position classification audit summary had in course of the study eventuating in the report, seven of twenty-seven positions under audit had been found to be deficient with respect to accuracy of position description;

(n) that one of the plans and recommendations developed in the course of the mentioned evaluation of

personnel management at the George C. Marshall Space Flight Center was the completion, by 30 June 1976, of an "annual position survey to assure proper position descriptions; proper title, series and grade; [to] identify misassignments; and [to] take corrective action as indicated...";

(p) that another of the plans and recommendations developed in the course of that evaluation was a continuous and ongoing review of new or vacated supervisory positions in order to: (1) Abolish where possible; (2) Emphasize supervisory and management responsibilities; [and] Move responsibility for accomplishment of technical work to subordinates where possible, retaining technical direction and review..."; and,

(q) that another of those plans and recommendations was to "[r]eview all supervisory positions to assure compatibility of responsibilities with delegations of authority...";

"I have additional information tending to refute several of the paragraphs of defendant's affidavit in support of his summary judgment; but I presently am advised that the information is not now in admissible form and that I will have to obtain it from other witnesses in order to be able to use it in this action.

"Speaking on the basis of my observations and experience while employed at Marshall Space Flight Center, I now say that *either* the National Aeronautics and Space Administration, *or* the defendant and those whom he describes as his 'subordinate managers,' *or* employees and officials of the corporations respectively owning the newspaper and the television stations which the defendant mentions in his affidavit, have in their collective keeping the data requisite to the proving of the following matters: (a) defendant's actual relative rank in the Space

Establishment as of the times of the acts of which I complain; (b) defendant's precise duties as of those times; (c) the circumstances under which defendant engaged in those acts; and (d) the identity of those acting in concert with defendant. Since I am not a wealthy person, it will be necessary for me to obtain much of the required data by interrogatories and requests directed to defendant, and by written questions directed to third persons.

"Since the Saturday before Labor Day of this year, I have spent about sixty-six hours gathering data for my lawyer to use in opposing the defendant's motion for summary judgment and helping my lawyer to prepare interrogatories to the defendant. Ten of those hours have had to come out of my annual leave. Since 26 January 1976, I have had to use one-hundred eighty-six hours of annual leave in my efforts to defend myself, and to vindicate my rights as an American citizen engaged in civil service, against the onslaughts of defendant and those acting in concert with him. Much of that annual leave went into the preparation of the appeal to the Civil Service Commission that the defendant mentions in the ninth paragraph of his affidavit which accompanies his motion for summary judgment. So far as I know, I am the only employee at the Marshall Space Flight Center who has not been allowed official time in preparation of such appeals; and there have been many such appeals taken within the last several years. (Please understand that I do not yet contend that I should be allowed what is called "official time" for the prosecution of this case; although it seems unfair to me that, so far, the defendant has been able to use Government-paid talent in the defense of the action.)"

Further, affiant saith not.

/s/ William C. Bush

Sworn to and subscribed before
me, this 22d day of September,
1976.

/s/ Mary Frances Walker
Notary Public,
State of Alabama at Large.

(NOTARIAL SEAL)

My commission expires: 4-25-78

Exhibit B To Plaintiff's Reponse, Etc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

* * * * * * * *

No. CA 76-P-0962-NE

* * * * * * * *

William C. Bush,
Plaintiff,

vs.

William R. Lucas,
Defendant.

ORDER

In consideration that plaintiff's interrogatories served on defendant are unduly burdensome for purpose of the pending summary judgment motion, the court hereby strikes ex mero motu both sets of interrogatories, served August 20 and August 22, 1976. Plaintiff is hereby directed that it may take

defendant's deposition, with the restraint that plaintiff's examination be concluded within three hours, subject to defendant's answers being responsive and straight forward.

Done this the 28th day of September, 1976.

/s/ Sam C. Pointer, Jr.
United States District Judge

---

[1] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHEASTERN DIVISION

[Title Omitted In Printing.]

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties through their respective counsel, that the deposition of DR. WILLIAM R. LUCAS ... may be taken before C. Frank McMillan, Commissioner, at the offices of Dr. William R. Lucas, Building 4200, Marshall Space Flight Center, Huntsville, Alabama, on the 20th of October, 1976, beginning at 1:00 p.m.

IT IS FURTHER STIPULATED AND AGREED that the signature to and the reading of the deposition by the witness is waived, said deposition to have the same force and effect as if full compliance had been had with all laws and rules of Court relating to the taking of depositions.

[2] IT IS FURTHER STIPULATED AND AGREED that it shall not be necessary for any objections to be made by counsel to any questions, except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of trial, or at the time said deposition is offered in evidence, or prior thereto.

IT IS FURTHER STIPULATED AND AGREED that notice of the filing of the deposition by the Commissioner is waived.

---

*[3] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
NORTHEASTERN DIVISION

[Title Omitted In Printing.]

Huntsville, Alabama
October 20, 1976

BEFORE:

C. Frank McMillan, Commissioner.

APPEARANCES:

Mr. Harvey Elrod, Attorney at Law, ... [Decatur,] Alabama, appearing on behalf of the Plaintiff.

Mr. Henry I. Frohsin, First Assistant United States Attorney, Northern District of Alabama, Room 200 Federal Courthouse, Birmingham, Alabama and Mr. Richard Reeves, Attorney at Law, Associate Counsel, Marshall Space Flight Center, Huntsville, Alabama, appearing on behalf of the Defendant.

[4] I, C. Frank McMillan, a Court Reporter of Birmingham, Alabama, acting as Commissioner, certify that on this date, as provided by the Federal Rules of Civil Procedure, and the foregoing stipulation of counsel, there came before me at the Marshall Space Flight Center, Huntsville, Alabama, Building 4200, on the 20th day of October, 1976, beginning at 1:00 p.m.,

---

* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Dr. William R. Lucas, witness in the above cause, for oral examination, whereupon the following proceedings were had:

DR. WILLIAM R. LUCAS,

having been first duly sworn, was examined and testified as follows:

* * * * * * *

[5] Examination By Mr. Elrod:

Q. You are Dr. William R. Lucas? A. Yes, sir.

Q. You are the Defendant in a suit now pending in the United States District Court for the Northern District of Alabama, in which Mr. William C. Bush is the Plaintiff? A. Yes, sir.

Q. In the course of that suit, have you had occasion to file or to cause to be filed by the First Assistant United States Attorney for the Northern District of Alabama, an alternative motion to dismiss or for summary judgment? A. Yes, sir.

* * * * * * *

(Whereupon, the above-referred to document was marked for identification as Plaintiff's Exhibit One.)

MR. ELROD: You might let the record show that I have shown—that I have given Mr. Frohsin a counterpart and I believe the witness has a counterpart before him, and I have one before me.

* * * * * * *

[6] Q. * * * You then have before you, I believe, a counterpart of Plaintiff's Exhibit One; or, if you prefer, I will let you look at Exhibit One and I will look at the counterpart. I invite your at-

tention to, first, to the second of the affidavits which accompany that motion and a part of the motion, namely your, I assume your, affidavit? A. Yes.

Q. For convenient reference I will ask the Reporter to number these paragraphs in your affidavit, just in the middle of the page, just above each paragraph, one through twelve, and that is going to save us some time; or if you prefer, Mr. Frohsin can do it and you can do it yourself. I have numbered mine in the middle like that.

* * * * * * *

[7] Q. Dr. Lucas, in the first paragraph, you of course identify yourself in the first paragraph of your affidavit? A. Yes, sir.

Q. Then you make reference in the third paragraph of your affidavit * * *, in the last sentence of it, to what you say is a copy of your official job description as being attached. Do you find that attached there on that counterpart? A. Yes, sir.

Q. * * * Is that description, position description current as of now? A. Yes, sir.

Q. Was it current as of the 25th of June, 1975? A. Yes, sir.

* * * * * * *

[8] Q. Here or at NASA Headquarters? A. I don't know, either here or Headquarters.

Q. You do hear from Headquarters occasionally? A. Yes, sir.

Q. With respect to personnel matters, is that right? A. Yes, sir.

Q. * * * Your * * * position as Director of the George C. Marshall Space Flight Center * * * is what is called, in governmental personnel parlance, a Public Law 313 Position, isn't it? A. Yes, sir.

Q. Are you familiar with the more modern version of it as a Type 5 USC Section 3104 * * * position, [9] have you heard of that? A. No, sir.

* * * * * * *

[10] Q. You are in the competitive service, aren't you? A. Yes, sir.

Q. And this position has to be approved by the CSC, doesn't it; the P. L. 313 position of which you are presently the incumbent? A. Yes, sir.

Q. And your incumbency had to be approved, didn't it? A. Yes, I assume it did.

Q. Who appointed you to this position? A. The Administrator.

Q. Of what? A. Of the National Aeronautics and Space Administration.

* * * * * * *

[11] Q. In the space establishment, Dr. Lucas, and by the way, as a matter of foundation, you have been in the space establishment what, twenty-five years? A. I have been in the National Aeronautics and Space Administration since July 1, 1960. I have been working in the space program for a longer period of time.

Q. So you have been in NASA since '60, or '61? A. '60.

Q. And before that were you in the private sector? A. No, sir. I was with the Department of Defense, Army working on the space flight program at that time.

Q. At Redstone? A. At Redstone.

Q. Then to go back to the first part of that transcontinental sentence that I interrupted, you folks in the Public Law 313

status in the space establishment, are primarily engaged in a research and development function, aren't you? A. To the— in the sense that all of the space establishment is involved in research and development, most of it.

[12] Q. Were you—

MR. FROHSIN: Wait a minute, let him finish. A. Most of the people at that grade are in the management end of the program.

Q. It still is in a research and development function, isn't it? A. Yes, sir, as is the National Aeronautics and Space Administration.

Q. And * * * NASA's functions are somewhat larger than the functions of George C. Marshall Space Flight Center? A. The Marshall Space Flight Center is an element of NASA, yes.

Q. Is it one of some eight, ten or more field installations for NASA? A. Yes, sir.

Q. And was that so in June of 1975? A. Yes, sir.

Q. * * * And as the incumbent Director of the George C. Marshall Space Flight Center of the National Aeronautics and Space Administration, did you occupy a higher level of authority than any other Director [13] of a field facility of the National Aeronautics and Space Administration, hereafter called NASA? A. No, sir. All the field centers are the same rank.

Q. They are all the same rank, all right. And in terms of rank, well we will employ that * * * in the quasi-military sense here. In terms of rank, how far down the chain of command from the President is the Director of a field facility, and more, specifically, were you as of June of 1975? A. Well, I report to the Associate Administrator for Center Operations, who in turn reports to the Administrator of NASA, who in turn reports to the President.

Q. And in terms of reporting, then the upward flow of communications, there would be two tiers between you and the Oval Office? A. Yes, sir.

Q. * * * You make some reference in the fifth paragraph of your affidavit to certain subordinate managers with cognizance over Mr. Bush's functions. Now, who were those subordinate managers? A. The subordinate manager to whom I delegated that [14] assignment was James E. Kingsbury, who is the Director of Science and Engineering.

* * * * * * *

[16] Q. * * * Mr. Kingsbury, this man you referred to a while ago as the subordinate manager to whom you delegated the matter of looking into ... what you [17] describe as Mr. Bush's allegations, was he a Public Law 313 employee? A. I don't know. He is either Public Law 313 or a NASA excepted.

Q. Do you know whether he caused any other subordinate managers further down the chain of command to look into the matter? A. He told me he did.

Q. Now this is the same Mr. Kingsbury, that a few months later signed a notice of proposed adverse action against Mr. Bush, isn't it? A. Yes, sir.

* * * * * * *

Q. In addition to this inquiry, among the subordinate managers, you say in paragraph five of your affidavit, * * * in effect, that you requested an independent investigation into Mr. Bush's allegation? A. Yes, sir.

Q. Now when was that investigation completed? A. I think around the 1st of July, 1975.

Q. It had not been completed at the time that you made the utterance that you attribute to yourself in the [18] seventh

paragraph of your affidavit, is that right? A. That is my understanding.

* * * * * * *

Q. * * * The investigation to which you referred in making this utterance [19] was not the independent investigation you referred to in the earlier paragraph of your affidavit, was ... it Dr. Lucas? A. Yes, sir. I referred to the investigation made by Mr. Kingsbury and also the investigation in progress by Dr. Olsen from which I had received a preliminary report.

Q. And this report—the investigation was completed in the latter part of July? A. Latter part of June is my recollection, completed on the 1st of July, around the first of July.

Q. Then you predicated your utterance on both the independent investigation and the inquiry among your subordinate managers, is that correct? A. That is correct, sir.

Q. You spoke with the benefit of an interim report of the independent investigation, is that correct, sir? A. That is correct, sir.

Q. And in that interim report, were there any witnesses' names given? A. Not to me. The report was made to me from my subordinate, Mr. John Potate, who in turn had received [20] the report from Dr. Olsen.

Q. You never saw the report in writing from Olsen, prior to the time you made the utterance? A. I did not.

* * * * * * *

Q. Apart from Mr. Potate and Mr. Kingsbury, what other subordinate managers do you recall having become involved at all in this inquiry, prior to the time you made the utterance? A. According to Mr. Kingsbury, or his report to me, he reported that he had involved all levels of management between himself and Mr. Bush.

Q. Did he report whether anybody had interviewed Mr. Bush at that stage? A. He did not report that to me, sir.

Q. Now, you say all levels of management; all levels of management would have had a community of interest in getting at the root of the problem, if it was a problem wouldn't they? A. I am not sure I understand your—

[21] Q. All of the levels of management would have had a community of interest in ascertaining whether Mr. Bush was correct or not, wouldn't they? A. I think all levels of management would have an interest in determining whether Mr. Bush was—what he said was true or not, yes, sir.

Q. And all levels of management would have been affected adversely by a determination that what Mr. Bush said was true, is that correct? A. Not necessarily.

Q. And then in what manner, * * * or on the basis of what factor, would they have avoided such an adverse affect? A. I wouldn't want to presume the adverse affect. I think—

Q. Then there would have been no adverse affect? A. I don't know that, sir, it depends upon what they found. If they found that the claims made by Mr. Bush were correct, then it would have been incumbent upon them to correct that situation.

Q. If they found that there was any element of truth in Mr. Bush's claim, that he did not have meaningful [22] work to do, would that have had an adverse impact on management here at all levels? A. I don't know, sir. That would be speculation and I just don't know.

Q. Well, let's speculate.

MR. FROHSIN: Well, let's don't speculate. He doesn't know.

MR. ELROD: He is the head of it, he is the head of the facility.

MR. FROHSIN: He is not going to speculate, he can answer the question, but if he doesn't know, he just doesn't know.

* * * * * * *

[24] Q. Since you have been serving as Director of George C. Marshall Space Flight Center, Dr. Lucas, have you from time to time received any instructions from Headquarters of NASA? A. Received instructions?

Q. Yes, sir. A. Yes, sir.

Q. How frequent—at what intervals do you receive some instructions? A. Well, we receive instructions at all levels, [25] about our budget or about our resource management, things of that nature. I suppose that we get some communications from Headquarters at least on a weekly basis.

Q. From time to time you receive instructions with respect to personnel matters, do you not? A. We receive policy guidelines with respect to personnel.

Q. Then you do not make policies with respect to personnel? A. Yes, sir, I do make policies.

Q. All right. What policies have you made as Director of Marshall Space Flight Center, with respect to personnel? A. Well, there are numbers of policies that I have made. First of all, I provided the organization chart, I determined the allocations of manpower into the various elements of our center. I determine the human resources that would be allocated to various programs that we have. I have approved charters of the organization.

Q. That was also pursuant to guidelines which emanated from Headquarters in NASA, wasn't it? [26] A. The organization originated here.

Q. I'm talking about your activity in determining the allocations of manpower and approving charters and so forth? A. No, sir. Headquarters does not tell me how to allocate the resources.

Q. Your activities in this area * * * have been pursuant to NASA guidelines, have they not? A. Yes, sir.

Q. You have not deviated from the Federal Personnel Manual, have you, to your knowledge? A. Not to my knowlege.

Q. The policy that you have formulated for this field installation has related primarily to the utilization of resources here in the research and development, hasn't it? A. To the utilization of our resources and research and development—

Q. Yes, sir. A. Yes, sir, that is true in that that is what we are involved in.

[27] Q. * * * I notice that your positional record which * * * follows your affidavit says, in a passage that you adopt in your affidavit, that the Director is totally responsible for all facets of the Center's operation; is that correct? A. Yes, sir.

* * * * * * *

[28] Q. At the time that you made the utterance, was there already in course a series of events that led to adverse action against the Plaintiff in this case? A. Not to my knowledge.

Q. This investigation that you mentioned, didn't have any—didn't contribute at all to the adverse action that subsequently was taken against this Plaintiff? A. It may or may not have, I answered I don't know of any series of events leading to adverse action.

Q. Well, do you know of any isolated events leading to the adverse— A. No isolated events.

Q. Do you know whether or not you made a decision in the course of adverse action? A. I don't understand.

Q. Do you know whether you made a decision in the course of that adverse action? A. I made a decision as represented by the letter that I put in the record.

Q. And that was an event, wasn't it? A. Yes, sir.

Q. * * * Do you know of any other isolated [29] event, in the course of that—just this fortuitous and adventitious concatenation, just in the course of that, do you know of any other events? A. Sir, I am sorry, I don't understand your question.

Q. You don't know of a series of events, so I assume that we will have to treat them as fortuitous, as a concatenation of unrelated events. Do you know of any other isolated unrelated event, other than your letter, in this course of adverse action? A. Well, I am aware of Mr. Kingsbury's letter of proposal.

Q. The letter of Proposed Removal? A. Right.

Q. Now the overall research and development program—in other words, would it be fair to say that the research and development program that was being implemented, was Marshall's mission here? A. Yes, I think so.

Q. That Marshall's mission is the implementation of certain phases or features of overall research and development programs? A. An overall research and development program of NASA projects.

[30] Q. Now, in order to go forward with any particular part of that program or any program or any part of that mission, * * * do you not have to have specific authority from NASA, didn't you have to have that in June of 1975? A. To discharge any mission here?

Q. Yes, sir. A. No, sir.

Q. You were given a program? A. I am given a program to implement and I am also charged with the responsibility of generating programs which does not require approval.

Q. * * * So to answer my question of several minutes ago with respect to the facet to which you were concerned at the time you

made the utterance, you were concerned with the overall mission of Marshall, is that correct? A. That is right, sir.

Q. Did it appear to you at the time, as best you can now recall, that these statements that have been attributed to Mr. Bush, held any significant portent for that mission? Did it appear to threaten the mission? A. I can't—I can't judge whether it threatened [31] the mission or not. As I testified earlier on that occasion I was responding to a question that was asked of me by the press.

Q. Yes, sir. And did you respond extemporaneously? A. Extemporaneously in the sense that I did not have written down a statement to make. However, I had considered how I would answer a question if asked on that matter.

Q. Well, did you consider that by yourself? A. Yes, sir.

Q. Or in consultation with somebody or both? A. I considered it by myself.

* * * * * * * *

[33] Q. At the time you made this utterance, Dr. Lucas, had you—and prior to that time, had you—did you wish that Mr. Bush wouldn't make such statements as those that have been attributed to him in the paper? A. Did I wish he wouldn't make them?

Q. Yes, sir. [34] A. You know, it never occurred to me until I saw it in the paper.

Q. Well, after you saw it in the paper, did you begin wishing he wouldn't do that again or do it anymore or anything like that anymore? A. I suppose I—it is hard for me to recall exactly what I might have wished. But, I wished of course that the problems of this nature would have been taken up within the management structure of the Center, or at least the Agency.

Q. You weren't aware at the time of any effort that he had made in that direction? A. No, sir.

Q. By the way, did you make any inquires, before you made the utterance, did you make any inquiry as to what efforts Mr. Bush had made to obtain, I won't say redress, but relief here within the facility? A. Redress for what, sir?

Q. I say I won't say redress, relief, relief for his grievance, whether real or fancied? A. No, sir.

Q. * * * Then at the time you made the utterance, you didn't know whether Mr. Bush had—whether [35] he talked to the newspapers as a matter of last resort or a matter of just venting ... his spleen or whatnot, did you? A. I didn't know the basis for which he talked to the newspaper.

Q. You hadn't bothered to make any inquiry to see whether there could have been any rational basis for such, what apparently appeared to you to be, an irrational act, had you? A. Yes, sir. I asked Mr. Kingsbury, as I testified here earlier, to investigate the fact of the matter surrounding the news release.

Q. Did this occur to you to be an irrational act on Mr. Bush's part? A. I had no basis for judging the rationality of the thing.

Q. You didn't? A. I did not. I didn't have that fact, all I saw was the article and I asked my subordinate Mr. Kingsbury to investigate the facts.

Q. You were the Director of the facility at the time, weren't you? A. Yes, sir.

[36] Q. And yet you had an investigation made to determine whether there was any basis for Mr. Bush's claim that he didn't have meaningful work to do at the facility for which you were Director, is that correct? A. That I worked through my subordinate managers.

Q. Then you didn't know, without the investigation, whether there was any basis in fact for the statement? A. No, sir, I did not.

* * * * * * *

[37] Q. * * * When did you request this independent investigation that you refer to in the fifth paragraph of your affidavit? A. That was several days, and I don't recall when, several days subsequent to the press conference I requested that.

Q. * * * You requested an investigation subsequent to the press conference, all right. A. Several days, I said, sir, after that.

Q. Subsequent to the press conference? A. Subsequent to the press conference.

Q. And after the time you made the utterance? A. Yes, sir.

Q. * * * Now just for the record as a matter of a little item of housekeeping. Throughout [38] when we refer to the affidavit, I mean, of course unless I say Mr. Groo's affidavit, I mean Dr. [Lucas'] affidavit that accompanies his motion for summary judgment, and when I say the utterance, I'm talking about [what] he attributes to himself in the eighth paragraph of that affidavit, and we will save a whole lot of time.

MR. FROHSIN: I'm going to clear up something for the record too, and I'm not sure—I'm not trying to place words in the mouth of the Deponent, and I'm not sure I understand counsel's question. But, if I understood your prior question you were talking about the investigation conducted subsequent to the press conference, you are talking about the ratification of the investigation or the investigation that had been conducted prior to the press conference for which you have alluded to, and I don't understand.

THE WITNESS: I misspoke that prior to the press conference. I was confused there, I am sorry, that I made a wrong statement there. The investigation I referred to is prior to the newspaper release, not the press conference. But then I asked Mr. Kingsbury—to clear the record of that, I asked Mr. Kingsbury to make an investigation immediately, as I recall on the [39] next day following the newspaper release of May 15th. And then some day subsequent to that news release, but of course prior to the press conference in which I answered the question, was when the independent investigation was started. I confuse those two things, the news release and the press conference.

* * * * * * *

[41] Q. * * * Now whenever it may have been that you requested the investigation, Dr. Lucas, whether it was before or after the press release or before or after the press conference, whenever it was, do you recall * * * to whom it was that you addressed this request? A. For the independent investigation?

Q. Yes, sir. A. I addressed it to Mr. John Potate, told him to address it to Mr. Olsen of the NASA inspection representative here.

Q. Is Mr. Olsen sort of in residence here? A. He is in residence here at the Center, and covers an area surrounding the Center.

Q. Is he sort of the watchdog for NASA? A. He reports to NASA Headquarters.

Q. Sort of monitors things here, and you say that is an independent investigation, now? A. Independent investigation in that — in the sense that he doesn't report to me. He reports to a Mr. Cummings in Headquarters.

[42] Q. Is there a lawyer, sort of detached from NASA's Headquarters, that is lurking somehwere around here watching you all most of the time? A. Well, I don't know that we have a lawyer detached from Headquarters lurking around and watching us.

Q. Well, is there anybody on the premises that is down here from NASA Headquarters to exercise a kind of monitoring function? A. Not to my knowledge. Mr. Olsen makes investigations, Dr. Olsen makes investigations, as I understand.

Q. If there is somebody around here from NASA * * * whose function it is to check on the local management, you don't know it, is that right? A. Well, let me — let me resay it. I have identified Dr. Olsen as a representative of the Inspections Office, and then we have a representative of the Audit Office here.

Q. All right, who is that? A. That is Mr. — I can't think of his name — I have to provide that name for you, the NASA Audit Office is located here.

Q. What is the NASA Audit Office? A. Well, that is a group of auditors that audit **[43]** various aspects of our operations.

Q. Is there more than one auditor, so to speak [,] here? A. There is one head auditor and then he has some subordinates and I don't know how many.

Q. And they function independently of the local management? A. Yes, sir.

Q. But they are [,] so to speak [,] in residence here? A. They occupy space here.

Q. They are on the base? A. Yes, sir.

Q. You don't rightly know what they might be doing then at any given time? A. They are not responsive to me at any given time and we identify to them what we would like to have

audited, and they do that at our request. And then I assume they either make on their own initiative or directive to make audits on other basis. But, they are not subordinate to me.

Q. Then at least in some respects your functions as Director of the George C. Marshall Space Flight Center, are subject to a continuing and ongoing and constant **[44]** surveillance by representatives from the NASA Audit Office? A. I think that is correct. I think the role that they occupy is a typical auditor function.

Q. Outside auditor? A. Yes, sir.

Q. * * * Now Mr. Potate of course was not a part of that audit team, was he? A. Which audit team, sir?

Q. The one that we have been talking about, he has never been a part of that? A. The audit team?

Q. Yes, sir, or a group that is from NASA that — A. The resident auditor.

Q. The resident auditor? A. No, sir, he was not a member of that.

Q. * * * He was your conduit to the Investigations Division of NASA, in order to obtain this independent investigation, is that correct? A. That is correct, sir.

Q. Do you know whether he had to state any grounds for wanting that investigation? A. I don't know what he had to state. I delegated **[45]** to him the authority to get it done.

Q. You delegate a good deal necessarily, don't you? A. I do indeed, yes, sir.

* * * * * * *

Q. The areas in which you directly, without intermediary at all, in which you directly are called upon to exercise dis[cretion]

are limited to some extent by virtue of the fact that you delegate a substantial part of your function to subordinates, is that correct? A. I exercise my job through my subordinates, yes, sir.

Q. And you exercise your discretion when you engage your subordinates, is that correct? A. That is right.

Q. And then you leave it up to them to carry out your — the assignments that you give them? A. That is correct. And, I require reports from them.

[46] Q. * * * At the time that you asked Mr. Potate to see about getting this investigation, this independent investigation [,] started, had you had any occasion to talk with any of your subordinate managers other than Mr. Potate, with respect to the probable impact of what you call the news release and I will call [the] May 15th article? A. I talked — I had received periodic reports from Mr. Kingsbury on the progress of his investigation. I had discussed the issue, as I mentioned with Mr. Potate, and I had also discussed it with Mr. Smith.

Q. How did you define the issue when you talked to Mr. Potate? A. Well, the news article, the impact of that article on our operations. And I asked Mr. Potate to have an independent investigation made of the case.

Q. Did you ask him to have an independent investigation made of the impact? A. No, sir, just the facts in the matter.

Q. The investigation was not directed toward the impact then, was it? A. No, sir.

Q. It was directed toward ascertaining whether or [47] not in point of fact, so far as the investigator was able to determine, whether Mr. Bush did have "meaningful work to do", is that correct? A. That is essentially it, yes, sir.

Q. Now apart from Mr. Smith and Mr. Kingsbury and Mr. Potate, have you had occasion to discuss Mr. Bush's statements,

as published in the 15 May article, with anybody here, any of your subordinate managers, apart from the ones I have just mentioned, Smith, Potate, Kingsbury? A. At what time, sir?

Q. [P]rior to the time you made this utterance, first? A. I don't recall having discussed that with someone between the time of the newspaper article and the time I made the utterance.

Q. * * * I will narrow it even further. Between the time you made the utterance and Kingsbury sent his Notice of Proposed Removal to Mr. Bush, did you have occasion to discuss the matter with anybody other than Smith, Kingsbury and Potate? A. Anytime between the time that I made the utterance **[48]** and the time that Mr. Kingsbury made —

Q. The time — that was * * * on or about 1 August, 1975, wasn't it—that he gave him that notice? A. Yes, sir.

Q. * * * At the time [,] and we will call it the August notice, between the time of the utterance in late June of '75 and the August notice, had you had occasion to discuss with any of your subordinate managers [,] first, the matter of Mr. Bush's, as you call them, allegations? A. I don't recall that I did. I may have discussed it at that time with Mr. Howell Riggs, who is the Director of our Personnel Office, but my recollection does not allow me to place it in that frame.

Q. You do recall having discussed the matter at some point in time as you say? A. With Mr. Riggs?

Q. With Mr. Riggs, is that right? A. That is correct.

Q. What was the occasion for you[r] discussing it with Mr. Riggs? A. The occasion was in conjunction with the decision that I made.

[49] Q. The range of punishments? A. I don't recall specifically that I discussed the range of punishments, but the format... for the decision letter and things of that nature.

Q. At the time that you made the utterance, did you conceive that Mr. Bush had been guilty of any erroneous statement of fact, as distinguished from opinion? A. Well, at the time I made the statement, I really didn't consider Mr. Bush's motivation at all. I simply responded to a statement that had been made.

Q. I'm not talking about motivation, I'm talking about whether did you conceive that his statement, whatever his motive might have been then, was ... true or untrue? A. Well, when I considered that part which I summarized by saying he had no meaningful work to do, I spoke to that by saying that that statement didn't have basis in fact.

Q. Then you did conceive that that statement was not correct; is that correct? A. The statement that he had no meaningful work to do was inconsistent with the information supplied to **[50]** me.

Q. Therefore you concluded it had no basis in fact? A. Yes, sir.

Q. Did you ask any of these people, these folks that were reporting to you, either Kingsbury or Olsen, if they had asked Mr. Bush about whether he actually made the statements? A. I didn't ask that question, no, sir. I believe Mr. Bush appeared on T. V. and made the statement.

Q. Well, * * * was that one of the several things you had in mind when you responded to the T. V. reporters' questions about whether he had meaningful work? A. I had in mind the statement that Mr. Bush had made, that he didn't have meaningful work to do in mind when I responded to the question of the T. V. reporter.

Q. However that may have been disseminated, whether by print media or broadcast media? A. That is right.

Q. The subordinate managers that you refer to in your affidavit, are they friends of yours as well as professional col-

leagues? [51] A. Not special friends. I have known, I believe I have known, them all for some period of time.

* * * * * * *

[52] Q. * * * In the sixth paragraph of your affidavit, * * * you say "[a]s a result of both investigations, I was assured that Mr. Bush did have a valid job description; that the function for which he was responsible was necessary to fulfill the Center's mission; that he did have enough meaningful work to keep him busy; and that, in fact, he had been putting in a reasonable day's work." Did you get the assurance from all of these heads or from a single person or did different phases of the assurance come from different sources? A. I obtained the assurance from Mr. Kingsbury on the basis of his investigations which I presumed he got from other sources. And I obtained the information from Mr. Potate who obtained it from Dr. Olsen, whom I presume got it from several other sources.

Q. And this was all before the utterance? A. Yes, sir.

Q. At the time that you, as you have sworn, were assured that he had a valid job description, was there any problem at all out here at Marshall Space Flight [53] Center about position descriptions? A. I don't know that. Any problem at all, I would — there could have been some problem and I couldn't testify there was no problem at all about job description.

Q. On the other hand, couldn't you testify that you were a participant in an ongoing joint venture survey of personnel practices at Marshall Space Flight Center at about that time, that showed that there was a substantial problem in position descriptions out here? A. No, sir. I couldn't say that at that time.

Q. That a survey wasn't going on at that time? A. The survey that I assume that you refer to, a survey conducted in the summer and fall of 1974, at which time we evaluated and rewrote in

a different format all of the GS-14 and 15 and selected GS-13 jobs in Science and Engineering. But that had been completed before I made the utterance. We are continuing to, even presently, to rewrite the job descriptions of the non-engineering jobs presently.

Q. Let the record show that I am exhibiting to the witness what purports to be a copy of Exhibit E [54] to the Plaintiff's interim response to Defendant's motion for summary judgment in this matter.

Does that item appear to bear a facsimile of your signature there, Dr. Lucas? A. Yes, sir, that is right. I signed that document.

Q. And it speaks as of when? A. Let's see, July of '75, that was a different thing to which I answered a few moments ago, a different survey.

Q. Oh, okay. Then this — the survey to which you had reference a while ago, was it a joint venture ... with the Civil Service Commission? A. It was a joint venture basis with — no, really not a joint venture basis. It was a venture by the Marshall Space Flight Center in which we gained the help from Headquarters classifiers and from classifiers that we brought in from other Centers to reclassify the job descriptions that I described earlier. This right here is a joint vent[ure], this is a self study that was a joint venture with the Civil Service Commission. This is a different document that referred to a different topic than my answer given previously.

Q. * * * Let's defer this one, then that you [55] have your hand on there [,] Exhibit F —

MR. FROHSIN: E.

Q. E, rather [,] to the Plaintiff's interim response to your motion for summary judgment; and we will defer that and talk

about this other survey. The other survey which you alluded to a while ago in answering one of my questions, was it had at the special instance of the acting Associate Administrator for Center operations of NASA, or Dr. Low? A. The job survey?

Q. Yes, sir. A. No, sir. That job survey originated in this fashion: At the time we were getting ready to make a very substantive reorganization of the Center which was placed into effect in early June, 1974. And we are doing co[incident] with a reduction in force, and the Civil Service Commission investigated the procedures that we were using to place the reduction in force, or to implement the reduction in force, and in the process of doing that, concluded that we had no real problems as far as the procedures being used for the reduction in force. But they did observe that some of the job descriptions appeared to, as a matter of concern **[56]** to them, they questioned whether they were sufficiently written or accurate. And it was on that basis that we undertook the survey, a very massive survey to be completed in a few months, of all job descriptions that I described earlier. And to do that, we did gain the support of the Headquarters classification experts and we brought in classifications experts from some other Centers as available to do that survey. And rewriting of all of the job descriptions in a new format designated by the Civil Service Commission, which I understand will be eventually applied across the board in Government.

Q. You rewrote the position descriptions first for Scientists and Engineers at GS-14 and above; isn't that correct? A. And selected GS-13's.

Q. And selected GS-13's, all right. You happen to know what Mr. Bush's general schedule level was or grade was at the time that this was going on, the survey was going on? A. I think it was a GS-14.

Q. Then he ...[,] like the other GS-14's in the scientific and engineering directorate here, would have **[57]** had his position record rewritten sometime between say June of '74 and July of '75, is that correct? A. Yes, sir.

Q. Now to this second evaluation or survey of which a counterpart of the cover sheet of it was marked Exhibit E to the Plaintiff's interim response to your motion for ... summary judgment, that was a somewhat more ambitious undertaking than the survey you just referred to a while ago, wasn't it? A. I wouldn't — I would not say so, sir. To rewrite all the job descriptions that we rewrote was a very ambitious undertaking. This was a self-evaluation to enable us to find wherein we needed to improve and to set ourselves a course to do that.

MR. FROHSIN: When you say this?

THE WITNESS: That is Exhibit E, is that it?

Q. Yes, sir. And in the course of that self evaluation, which incidentally was had I suppose, or I suggest and tell me if I am wrong, at the express direction of the Associate Director for Center Operations, wasn't it? **[58]** A. To the best of my knowledge that was an evaluation that was asked for by the Civil Service Commission. I am not sure if it came directly to us or through Center Operations and I presume it was not pointed only at Marshall, but is done in several places.

Q. I see. In any event in the course of that evaluation, you all, and I say you all advisedly because you did participate in it, didn't you? A. I approved the document.

Q. * * * Found that there were certain weaknesses in personnel administration here at the Flight Center, * * * didn't * * * [you]? A. Yes, sir, we found certain weaknesses and certain strengths.

Q. * * * And if you will look now, please, sir, down several pages, I believe it would be about the thirty-ninth page number in the upper right-hand corner [—] somebody has added that number. Is there a paragraph two there in the middle of the page? A. Yes, sir.

Q. Then turn to the next page and sub-paragraph c, **[59]** and tell me, does that paragraph say in substance that the study showed that there were certain deficiencies in position documentation here and that the Center had made some progress toward ... straightening the matter out, and that any residues would be corrected in the fiscal year ... '76? A. Yes, I believe that is essentially what it said. It says, as I would view it [,] ... [that] a substantial step has been made in straightening out the engineering positions.

Q. * * * And when did the fiscal year of '76 begin? A. It began in July 1, '75.

Q. * * * And at the time — let me ask a preliminary question[:] Had you seen a draft of this item, a truncated part of which is Exhibit E to the Plaintiff's response to your motion for summary judgment, had you seen any part of that item or any draft of it [,] at the time that you made the utterance? A. I don't recall.

Q. Well, in the normal course of events, would you have seen it if it speaks as of July of '75, would you **[60]** have seen it before the 25th of June, '75? A. I would normally do so, but I don't know whether that was on the 31st of July or the 1st of July. I just don't recall.

Q. But the fiscal year — A. But I would see it several days before I signed it, I am sure.

Q. Let's see, then do you have any judgment or recollection, whether or not you might have seen a draft of this or some

preliminary memorandum with respect to subject matter of that item, before you made this utterance? A. I just don't recall.

Q. In other words, you don't have any recollection or judgment at all? A. As to when I saw it?

Q. As to whether you had seen either the final item, the final evaluation of personnel management at Marshall Space Flight Center, or any preliminary draft of it, prior to the time you made the utterance? A. I don't know, sir. I don't think it would have affected the utterance.

* * * * * * *

[62] Q. * * * Then was the utterance something that was entirely separate and apart from the adverse action process against the Plaintiff, Mr. Bush? A. What — to what adverse action do you refer?

Q. The one, the only one I know of is when he was down graded two grades, which you did. A. Oh, no. No, no, that — I was not of course not.

* * * * * * *

[63] Q. And they were entirely two different things? A. Yes, sir.

* * * * * * *

[65] Q. * * * At the time that you made the utterance, were you giving any consideration at all to taking adverse action or having adverse action taken against Mr. Bush? A. No, sir, to both of those questions.

Q. Dr. Lucas, are you — do you have any knowledge or information as to whether supposedly disinterested observers have reported to you at any time in the relatively recent past, that it seemed to them that adverse actions against personnel at Marshall Space Flight Center seemed frequently to follow the par-

ticular employee's complaining about his job or his status? A. Disinterested observers?

Q. Supposedly disinterested, I'm not vouching for them, I'm just saying — **[66]** A. That have reported that —

Q. Have communicated to you that they came here and made a tour and looked around, and sent ... [word] back to you that it appeared to them a good way to get an adverse action going against you here is to complain about your job or your status, in effect? A. The only instance I can recall, and I am not sure that I recall specifically as you have recited it. But, I recently have received a letter from Senator Allen, which included a report alleged to have been made by members of his staff here on the basis of some discussions with people that implied that. But I am not aware of any investigations, I wasn't aware of their presence here nor in fact that they were here.

* * * * * * * *

Q. Have you received any report, Dr. Lucas, in the relative[ly] recent past [,] to the effect that independent observers, or at least allegedly independent observers [,] had p[er]ceived or apprehended [,] or thought they had p[er]ceived or apprehended, or had the impression of a kind of general fear of reprisal by the Marshall **[67]** management against employees for union participation by professional and technical employees? A. Union — I didn't get the last two phrases or the last phrase there.

Q. Participation by — union participation by professional and technical employees? A. If there was fear of reprisal?

Q. Yes, sir. A. Against them — In this report that I referred to which Senator Allen sent to me with a cover letter that said he recognized there is only one side of the issue, one they had perhaps drawn that conclusion from that report by his staff.

Q. You have given him the other side by now, I take it? A. No, I have not. I am going to give him the other side at least I will give him whatever side is right.

Q. That is more than apt to be management's side, I expect? A. Well, I would say we try to give what is fair.

[68] Q. * * * Have you ever had any inquiry from the Administrator of NASA, Dr. Fletcher [,] with respect to your participation in the adverse agency action against Mr. Bush? A. At the time this was under consideration, as I recall it, after the charge letter had been given, Dr. Fletcher received inquiries from Senator Proxmire, I believe, and perhaps others. And he did call me on the phone and ask me the status of the case.

Q. That is all, that is the only contact, the only inquiry that Dr. Fletcher made of you with respect to the adverse action against Mr. Bush? A. That is the only one that I recall.

Q. . . . I believe you indicated you have got some sort of instructions maybe once a week or something like that: but, by and large, are you in a daily contact with NASA Headquarters by electronic . . . [means]? A. I personally am not on a daily contact with NASA Headquarters. And, to the earlier question, the answer I gave you referred to the Center, not to me personally.

Q. Yes, sir. A. but, we get — we are in mail communication with [69] Headquarters obviously, and we do refer — we do communicate by telephone. And we do communicate personally and directly.

Q. On a daily basis. A. Not on a daily basis.

Q. In your judgment, how often do you call Headquarters at NASA? A. On any matter?

Q. Yes, sir. A. Oh, I would say probably about once a week. Some weeks there might be several times, there may be two or three weeks when I don't call at all.

Q. Does NASA Headquarters sometimes call you? A. Yes, sir.

Q. Some person at NASA Headquarters sometimes calls you? A. Yes, sir.

Q. Mr. Groo ever call you and talk about matters? A. Mr. Groo calls me occasionally.

* * * * * * * *

[70] Q. What opportunities has he had to know what your functions and duties were? A. Well, when he has visited the Center on occasions.

Q. How often? A. Oh, I guess two or three times a year. And he comes for a rather comprehensive Center review on a[n] annual basis. And then he usually appears one or two times between that and we have a meeting of Center Directors with him on a periodic basis, I would say about bi-monthly, the various Center Directors get together with Mr. Groo. And I'm sure that he has other means of finding out what is going on.

Q. The Center Directors' [meetings,]...do they kind of rotate from one Center to the other? A. Yes, sir.

* * * * * * * *

[74] Q. You have a Director of Safety here on this base? A. Yes, sir.

Q. Who is he? A. Mr. R. L. Smith, Jr.

Q. Would he be conversant with that, with what in general your functions and responsibilities are? A. Yes, I believe I mentioned him as one of those.

Q. How long has be been in that position? A. Well, let's see, I suppose about two years or maybe, I don't know, one of two years.

Q. Who was his predecessor? A. His predecessor, Dr. Leslie Ball.

Q. Would he have had substantially the same opportunities as Mr. Smith to observe your duties and functions? A. Yes, sir, I think he would, except that I don't believe he was Safety Director very long while I have been Director. I am reasonably sure that he has [75] not.

Q. You mean he has not been Safety Director? A. He has not been Safety Director to any significant amount of time while I have been Director.

Q. Were the duties and authorities and responsibilities of the Office of [Safety] Director of the George C. Marshall Space Flight Center of NASA changed at the time that you became Director? A. Not to my knowledge.

Q. Then if Dr. Ball — is it Dr. or Mr.? A. Mr. Ball, I believe.

Q. If Mr. Ball was here prior to — was here as Safety Director or whatever that title was, prior to your incumbency, he would have had the opportunity to observe the duties and functions and responsibilities that appertain to the office of [Center] Director, is that correct? A. Yes, I believe that is correct.

* * * * * * *

[79] Q. * * * When the time came for adverse action to be taken against Mr. Bush, did you and Mr. Kingsbury have a community of interest in the seeing that that action was taken? A. What do you mean, community of interest, sir?

Q. Did you both want to see that the action was consummated? A. No, sir. I didn't become involved in that until Mr. Kingsbury had decided what to do about the matter, or recommended.

Q. You did see a draft of the August letter, didn't you, Dr.? A. Yes, sir, I testified that I saw a draft of the August letter.

Q. Was * * * the exhibiting of that draft to you [,] prece[eded] by any discussion * * * between you and Mr. Kingsbury? A. No, sir it was not.

Q. In other words, he walked in, and in effect he said I have decided to give Mr. Bush notice that we are firing him, in substance? [80] A. That is the first time I discussed the matter with Mr. Kingsbury on that. I had heard from my legal office that S. and E. was recommending action against Mr. Bush, but I did not engage in that discussion with Mr. Kingsbury.

Q. Is that the only place you heard that from, your Legal Office? A. I believe that is correct.

Q. After the oral reply session in the course of that adverse agency action, did you have occasion to express your views about firing Mr. Bush? A. No, sir.

Q. To any of your confidants? A. No, sir.

Q. You didn't? A. Did not.

Q. Whether you had occasion or not, did you? A. No, sir.

Q. Now, if you will, look at the ninth paragraph of your affidavit a minute, please, sir, and I want to ask you two or three questions about that, and then try to draw some loose threads together here and then we will stop. [81] You notice you say, "[B]ecause of Mr. Bush's many public remarks which were misleading and often false, and which brought discredit to the

Government Service, he was notified by a letter dated August 1, 1975 from Mr. James E. Kingsbury," and so forth, of a proposed adverse action to remove him from Center employment. Let me ask you first about that passage, and I want to ask you this: Did those public remarks substantially complicate your task as Director of George C. Marshall Space Flight Center? A. The fact that — I really — they complicated it in the sense that my judgment was that those public remarks which were false and misleading was depressing to the moral[e] and to the attitudes and respect of the people in the Center, for the Center, they would affect the productivity of the Center and that, in that sense it complicated them.

Q. I have asked you a question or two along those lines on prior occasions, do you remember? I asked you a question or two along the effect on the moral[e]? A. Yes, sir.

Q. Do you recall I asked you to name the people [whose] . . . moral[e] was affected [82] A. Yes, I recall that.

Q. Do you know how many you were able to name? A. Well, I named — I named a few people that I had had some expressions from, and I indicated that it was my judgment that such statements would affect the morale of the people.

Q. * * * Now, you have characterized some of these statements as false. Do you recall offhand which ones, any one that was false? A. If you could provide me a copy of my decision, I'll be glad to.

Q. Let's have copy of this decision letter. A. I can indicate which I consider false and which I consider misleading.

Q. While he is looking for that, I will ask a preliminary question: You differentiate between those that are outright false and those that just have misleading tendencies? A. Yes, sir.

MR. BUSH: Here it is.

THE WITNESS: All right. I will refer to the second page of that letter, looks like paragraph B or Two, that sub paragraph B, then about one third of the **[83]** way,["] as a result, you were publicly quoted as making the following statements:

Number (one): "That position number 19343-S was written [im]properly to support the GS-15 Branch Chief and was a falsehood, and travesty and worthless." I would consider that false.

"That you were reporting what appears to be a fraudulent use of federal funds." I would consider that misleading.

(3) "That personnel records had been removed from your desk." I would say that is misleading.

"That you were told by management to keep my mouth shut." And I would say that is false.

"That personnel actions taken by MSFC made a mockery of a Civil Service Commission's decision —", and I consider that false.

"That you are not the only one at Marshall who had a grossly inaccurate job description." And I would consider that misleading.

"(8) That you had never been told who to **[84]** supervise." I consider that false.

And (9) "That you did not have a telephone for eleven months." That is certainly misleading, if not false.

Q. • • • Any others? A. I think that is about it. Down here where it says "I don't even know what their jobs are," that is either false or misleading. "You state that if your job is abolished a whole lot of other people will lose their jobs too," and that is false.

• • • • • • •

Q. Who is it that made that statement from the context of your letter of 25 November . . . [—] let the record show he is referring to a copy of his November 25th letter. A. It says "you state that if your job is abolished a whole lot of other people will lose their jobs, too."

"It's like a house of cards", and that is in quotes there also.

Q. * * * [A]ny others? **[85]** A. I think [that] is it. Well, one here stated that is misleading, he misled the public by * * * making seemingly honorable statement[s] that all I want is employment, that is labled as misleading in the letter. These are comments of other people. Here is one here at the top of page three, paragraph C: It states that "Marshall has lost its design and analysis capability and has become a contract-monitoring entity", and that "one of the basic problems here is the poor quality or absence of management" and I consider that false. * * * I think * * * the statement [that Marshall] has lost its design analysis capability and become a contract-monitoring entity is false.

Q. In its entirety or is it not true that Marshall is a contract-monitoring entity? That may not be all it is, but it is a contract-monitoring entity[?] A. My interpretation of that is in lieu of any design analysis that we have become an exclusive contract-monitoring entity and that would certainly be false. **[86]** Marshall has always been a contract . . . monitoring entity to a degree. The thing that I refer to specifically is Marshall has lost its design [and] analysis capability, and that is clearly, in my opinion false.

Q. The capability is here, in your judgment? A. Yes.

Q. And was then? A. Yes, sir.

Q. Now was it being employed? A. Yes, sir.

Q. In what? A. Well, it was being employed in several of our projects, most notable being in the design of the SRB, the structures of the SRB. It was being designed and the analysis of — and the design and analysis of LAGEOS of what we call the GPA, our gravitational . . . [Red] shift program and it was being, I would say, the analysis capability was being applied in virtually every program in which we are involved.

Q. Of course the analysis capability would be utilized in monitoring, wouldn't it? I mean, if there would have been no in-house designing there would be some analysis, of course, in monitoring, [w]ouldn't there?] **[87]** A. Could be.

Q. And * * * most of the LAGEOS design was done by Brown-Teledyne, wasn't it, or Teledyne-Brown? A. I don't know how the design was done.

Q. What about the SRB? A. Some was done by Teledyne-Brown on our support contract and some was done in-house.

Q. * * * With continuing reference to the ninth paragraph of your affidavit in its entirety, I want to ask you what was the purpose of this adverse action against Mr. Bush? A. Which adverse action?

Q. The one that you encapsulate there in the ninth paragraph of your affidavit? A. Of Mr. Kingsbury's proposal or as Center Director that I later considered the proposed adverse action?

Q. Yes, sir. What was the purpose of that adverse action as you understood it at the time you made your decision? A. The purpose was to — was a disciplinary or a **[88]** penalty for having made the false and misleading statements.

Q. The purpose was to discipline or punish Mr. Bush for having made false or misleading statements; is that correct? A. Yes, that is right.

Q. You didn't give any consideration to . . . [the] deterrent effect on other people if they happened to be like-minded? A. No, I did not consider that as an example.

Q. Just intrinsically, then, you didn't give any consideration to either . . . [its] impact upon the establishment here, so to speak, the institutional impact, let's put it that way? A. No, I am not — I am referring now to what the parts that I did here which was represented by my letter of November 25th.

* * * * * * *

[93] Q. Who made personnel policies for the Field Installations for NASA during 1974 and '75? A. Well, I made certain personnel policies as far as it affected the Center, within the guidelines that I received from Headquarters. And the Administrator makes the personnel policy for the whole agency within guidelines that are set down by the Civil Service Commission.

Q. Then you were subject to broad and overall guidance from the National Aeronautics and Space Administration in all that you did as Director of Marshall Space Flight Center? A. Yes, sir, on implementing a part of the NASA program.

Q. The reporter that you referred to in the seventh **[94]** paragraph of the affidavit, did he ask you anything about what [you] call the public allegations or the public allegations as far as the Plaintiff, other than the Plaintiff's statement that he didn't have meaningful work to do? A. No, sir. To the best of my recollection he asked me about three or four questions, and the first being are you familiar with the allegations that Mr. Bush has made to the effect that he doesn't have meaningful work to do. And, I said yes, I am familiar with those allegations, and then he said what is your response to that, what is your position on that matter, after which I gave the answer that I had had those statements investigated and on the basis of that information that I could say unequivocally that the statements or allega-

tions to the effect that he had no meaningful work to do had no basis ... [in] fact. And then as I recall he asked the question did that surprise you, that one of your people would say he had no meaningful work to do. And, I responded to the effect that yes, that does surprise me because in view of the hours and schedule that I worked, and in view of the schedules worked by most of the people immediately **[95]** around me who report directly to me, I am surprised. And then as I recall he asked the question, can you have his job abolished, I don't recall if he said can you or will you, but anyhow the substance was can you have his job abolished and I responded no, I could not, because it was necessary to the mission of the Center, and that is, to my recollection, the extent of the questions.

Q. And in what respect was his job necessary to the mission of the Center? A. Well, it was a part of the organization that we had, management had determined to be necessary to implement our mission.

Q. You determined that in advance of undertaking the operational implementation? A. I beg your pardon?

Q. You had made that determination in advance of actual operations, hadn't you? You had projected that that position would be necessary, isn't that correct? A. That is correct, we had.

Q. And you did not have before you any empirical data on actual operations as to whether or not he actually **[96]** had any work to do, though, did you? A. Did I?

Q. Yes, sir. A. I had been — I did not personally, my management people —

Q. That is all. A. People did.

Q. Then you had an active disbelief of Mr. Bush's statement about not having meaningful work, you actively disbelieved that

at the time you made the utterance, is that correct? A. On the basis of the information supplied to me I disbelieved that.

Q. Now, you make some reference in the sixth paragraph of your affidavit to a valid job description. Did anybody ever advise you, prior to the time you made the utterance, as to whether Mr. Bush had work that corresponded to that job description? A. Yes, sir. That was the way I understood it.

Q. Did anybody so advise you? A. Yes, Mr. Kingsbury did.

Q. Did he send the details, did he take out the job position and then look over there and say here I [97] want to collate these with the actual duties or actual tasks or anything substantially along those lines? A. He did not.

Q. Have you ever written any position descriptions for positions in the classified service? A. Ever?

Q. Yes, sir. A. Yes, sir.

Q. You have had some substantial experience in that? A. None recently but many years ago I had experience.

Q. Is it the practice that the man's immediate supervisor prepares the description record or drafts it and then sends it in to the classiciation, or what is the practice established, the practice with respect to the preparation of position record descriptions? A. Well, you know I can describe how it was done years ago when I did it and I am not confident whether that is the practice now or not.

Q. Well, how was it done when you did it? A. When I did it, the man's supervisor determined the elements of the job. And, he gained assistance from a personnel management expert in setting forth those duties in the proper language. Then that job [98] description was handed to another set of experts, the classification experts who graded the job and determined the

level at which it should be graded. That is — it may be out of date experience, but that is the best that I remember.

Q. Do you remember whether any of your subordinate managers, and I guess I am thinking we have pretty well narrowed that down to Mr. Kingsbury, ever reported to you that he or any of his subordinates had talked to Mr. Leonard Householder with respect to whether Mr. Bush had any actual duties? A. I don't remember anybody mentioning Mr. Householder.

Q. Do you know where Mr. Householder was working then, physically in terms of where Mr. Householder was working? A. No, sir.

Q. You didn't know that at the time you made the utterance? A. No, sir.

Q. So far as you know or can ascertain or could ascertain or did ascertain, did Mr. Kingsbury discuss the content of his 1 August letter with any persons other than you, before he sent it to Mr. Bush? **[99]** A. I don't know that.

Q. Do you have any judgment who would know other than Mr. Kingsbury? A. Mr. Kingsbury would know.

Q. But no other person that you know of? A. I couldn't testify that any other person that would know that.

Q. You can't testify to it? A. Because I simply don't know.

* * * * * * *

[100] Q. Have you ever seen any report of the General Accounting Office with respect to property management * * * here at Marshall Space Flight Center, during the fiscal year '75 or '74, either one? A. I have seen reports to the General Accounting **[101]** Office on numerous things and property management is one that I have seen a report on. I don't recall the specific date.

Q. Do you remember seeing one which indicated that between 1 June, '73 and 1 March, '74, capital items of an aggregate value not less than a million six hundred thousand dollars received at Marshall Space Flight Center [were] therafter treated as expendible materials rather than as a capital equipment? A. I don't recall specific, if I saw that report — I am aware that coming out of the Apollo Program there was a determination made [th]at some of the program — some of the property that had been considered expendible should have been capitalized. But I don't recall that specific report.

Q. But after the fact, determination instead of [treating it as] expendible, they should have capitalized it in effect? A. That is the way I recall it.

Q. Well, at the time that you made this utterance, you were aware, were you not Dr. Lucas, that the General Accounting Office had already reported, either tentatively or firmly, a conclusion that there were certain, at least alleged, irregularities and misconstructions in the course [102] of the application of governmental accounting practices here at George C. Marshall Space Flight Center? A. I don't recall that in relation to this utterance.

Q. What was it in relation to? A. I don't relate it to any time.

Q. Well, you do recall such a report? A. I recall such a report that had to do with the capitalization versus expendible considerations, and I don't recall the specific point. Did that come from the same report, I don't recall that.

Q. It is according to my information. A. I don't recall that specifically.

Q. You did not have it within your power in June of 1975 to dismiss Mr. Bush summarily, did you? A. I never considered that in 1975.

Q. Well, did you have it in your power? A. To what, what did you say, summarily?

Q. To summarily dismiss him for having made these statements? A. When you say summarily.

Q. Without a hearing? A. I wouldn't think so, no.

[103] Q. * * * Your position description that is attached to your motion, says in the second paragraph down in the summary section, * * * that you report to the NASA Associate Administrator for Center Operations who establishes specific accountability relationships. Please tell me on the basis of your experience in Government service and as incumbent of that position, just exactly what that phrase, ["] specific accountability relationship, ["] means to you? A. Well, that means that he determines those things that he would delegate to me, and on those things in which he would require reporting to himself.

Q. In other words, * * * whatever authority and responsibility you have as Director ... has been delegated to you from the Associate Administrator for Center Operations? A. Well, not specifically from the Associate Administrator for Center Operations. But, under the guidelines of the NASA management instructions, all of which he does not define.

Q. You are the recipient of a fairly broad delegation, is that correct? A. Yes.

[104] Q. And above you, the Associate Administrator for Center Operations is a recipient of even broader delegation; is that correct, [illegible] as far as you know? A. Yes, so far as I know.

Q. And above him, the Administrator of the NASA is the recipient of a delegation of even broader responsibilities for the Aeronautics and Space Program? A. So far as I known, yes, sir.

Q. Do you have a series of successive fairly broad delegations, then? A. Yes.

Q. And you in turn also make some broad delegations, is that correct? A. That is right.

Q. You do not have authority to initiate on your own, this investigation that you called the independent investigation, did you? A. I had to request that investigation because the man does not report to me.

Q. All right, sir. And that did — did that investigation or interim report of it form any basis of your denunciation of Mr. Bush's statement as having no basis in fact? **[105]** A. The interim report that I had received, as I think I have testified, together with the report I had received from Mr. Kingsbury, did establish in my mind the basis for this statement that I made.

Q. Was that interim report in writing? A. No, sir, it was orally given.

Q. ... [*Viva voce?*] A. Yes, sir.

Q. How long before you made the utterance? A. It was a matter of hours, I think it was within possibly two or three hours.

Q. Just coincidentally or did you check it out before in anticipation — A. Not by coincidence, I think I indicated earlier I had asked Mr. Potate prior to my going to the press conference, if — what is the status of the report from Dr. Olsen, in case I happen to be asked that question.

Q. Mr. Potate's duties keep him here most of the time? A. Yes, sir.

Q. All right. And he reported back to you within a matter of hours, is that right? **[106]** A. He reported to me immediately because it — he had just had a report from Dr. Olsen some short time before that, either that day or the previous afternoon.

Q. Just happened that way so far as you know? A. I don't know what basis, whether he called him or asked him or whether Mr. Olsen just dropped by and told him.

Q. He drop in and out occasionally? Olsen just drop in and out occasionally? A. I don't know.

Q. Olsen ever talk to you about this matter? A. Not to me directly.

Q. Olsen have anything to do with the draft, so far as you know, the drafting of this letter of August from Kingsbury to Bush? A. Not to my knowledge.

Q. Do you know anybody that might know whether he did or not, other than Olsen? A. I think Mr. Kingsbury would know.

Q. Anybody else? A. That is the only one I would know.

Q. How about Mr. Miniter, do you know him? A. No, I don't know if I have met Mr. Miniter or **[107]** not. I really — I may have met him on an occasion, but I don't think I would know him if he was to walk in the room.

Q. Do you know whether Dr. Olsen was consulted by anybody with respect either to the drafting of the accusing letter of August, the Notice of Proposed Removal, or the drafting of your notice of decision in November, the one that you read from this afternoon? A. I don't know. I had read his report but I did not discuss it with him and I don't know if anyone else —

Q. You got some of that letter out of the report, didn't you? A. I quoted some of the things that he found.

Q. Yes, sir. Do you know what distribution was made of that report? A. No, sir, I do not.

* * * * * * * *

Re-Examination:

[112] Q. Dr. Lucas, your appointment to this position did not require confirmation by the Senate, did it? A. No, sir, it did not.

Further the Deponents saith not.

* * * * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

[Title Omitted In Printing.]

PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

By way of supplement to his previously served and filed response to defendant's motion for summary judgment in the above-entitled action, the plaintiff herewith invites the court's consideration of the following statement and accompanying affidavits:

Statement

Since the motion docket of 23 September 1976, plaintiff has taken the deposition, upon oral examination, of the defendant. In response to inquiry by counsel for plaintiff, a docket clerk has advised that counsel that the court reporter filed the transcript of that deposition yesterday, 2 November 1976. As this is written, counsel for plaintiff has not yet received his copy of that transcript. Notwithstanding the lack of such copy, plaintiff does now call the court's attention to the following facts which counsel's notes indicate to be disclosed by that deposition:

(1) At all material times, the defendant has occupied a position which, though referred to as a "Public Law 313" position, is within the competitive service. There are twelve or so such positions at MSFC. At least some of those positions are "passed around" at intervals. [Although the dependent professed not to be aware of the change in terminology, such positions currently are called "5 U.S.C. 3104-type positions," no doubt to reflect the codification and amendment of the original statute under which certain scientific and professional positions were created *in* the civil service.]

(2) PL 313, or 5 U.S.C. 3104-type, positions in the space establishment functionally are research and development positions, because, as the witness opined, either NASA at large or MSFC has (or both have) a research and development mission.

(3) The appointment of one to such a position requires CSC approval.

(4) The defendant was not appointed to his position by the President of the United Statse. His appointment did not ... [require] confirmation by the United States Senate.

* * * * * * * *

(1) At as many different points in the course of his testimony, the defendant assigned three different times as the times at which he requested the "independent investigation" to which he refers in his affidavit. At one point, he testified that he requested the investigation "after the press conference." Later, after consulting with Mr. Frohsin, he indicated that by "press-conference" he referred to plaintiff's "press release" which was published on or about 15 May 1975.

(20) The General Accounting Office keeps an audit team more or less in residence at MSFC, and was doing so in June of 1975.

* * * * * * * *

(22) While admitting knowledge, as of June 25, 1975, of at least one personnel management survey at MSFC, the defendant equivocated with respect to the exact time of publication of the report entitled "An Evaluation of Personnel Management at the Marshall Space Flight Center, July 1975," the cover sheet of which he admitted to bear his signature. [A truncated version of that report appears as Exhibit E to the Plaintiff's Interim Response to Defendant's Motion for Summary Judgment. Counsel for the defendant said, during the course of the taking of the defendant's deposition, that the defendant would admit the authenticity of that exhibit, or words to that effect.]

(23) The defendant and his "subordinate managers" had a community of interest in seeing that the plaintiff was punished if the facts disclosed that the plaintiff deserved to be punished.

(24) The utterance which the defendant attributes to himself in the seventh paragraph of his affidavit, however, was something entirely separate and apart from the adverse personnel action taken against the plaintiff.

* * * * * * * *

(26) The defendant reports to NASA's Associate Administrator for Center Operations, who reports to the Administrator of NASA, who (as the defendant said) reports to the President of the United States.

(27) The prior incumbent in the position of Safety Director of MSFC was so situated that he would know, from personal observation, the nature and scope of the defendant's and the latter's predecessor's duties as Director of MSFC.

(28) That prior incumbent is Leslie W. Ball.

The affidavit of Dr. Leslie W. Ball is attached as Exhibit "G" to plaintiff's augmented response to defendant's motion for

summary judgment. It discloses that, according to the observations of an affiant as to whose qualifications the defendant had vouched, neither the defendant nor his two immediate predecessors have made much policy and, further, that the duties of the Director of MSFC, during the relevant period of time, have not included the voluntary making of pronouncements with respect to senior personnel management at MSFC. That affidavit further tends to show that, according to the observations and opinion of the affiant Ball, NASA Headquarters has kept the defendant pretty much in leading strings, especially since Mr. Groo became NASA's Associate Administrator for Center Operations. Finally, the affidavit of Dr. Ball corroborates the plaintiff's views of the unreliability of position records as guides to actual duties and responsibilities.

* * * * * * * *

/s/ Harvey Elrod
P.O. Box 632
Decatur, Alabama 35602
Attorney for Plaintiff

HUTSON, ELROD, EDWARDS & BELSER
Of Counsel

[Certificate of Service omitted in printing.]

[Title Omitted In Printing.]

AFFIDAVIT OF LESLIE W. BALL FOR USE IN OPPOSING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

STATE OF ALABAMA
MADISON COUNTY

Before the undersigned authority in and for said county in said state, this day personally appeared Leslie W. Ball, who, being first duly sworn, did depose and say as follows, namely:

"My name is Leslie W. Ball. I am sixty-four (64) years of age. I reside at 2007 Cliffmanor Circle, Huntsville, Alabama. I presently am employed with the National Aeronautics and Space Administration, at the George C. Marshall Space Flight Center. I have been employed at that facility since October, 1970.

"Between a day in March, 1971, and a day in March, 1975, I served as Director of Safety for the George C. Marshall Space Flight Center. In that capacity, I came daily into contact with the Director of the George C. Marshall Space Flight Center. My duties and office quarters were such that I had ample opportunity to observe the functions and activities of the Director.

"When I first became Director of Safety at the Marshall Space Flight Center, the incumbent Director of that field installation of NASA was Dr. Eberhard Rees. The defendant William R. Lucas became Director in, as I recall, June of 1974.

"Both during the incumbency of Drs. Rees and Petrone and the incumbency of the defendant, the functions and duties of the Director of the George C. Marshall Space Flight Center were limited, to my personal observation and positive knowledge, to the carrying out of policy decisions made at a higher level of the NASA hierarchy. During the period that the defendant was Director of the MSFC and I concurrently Safety Director of that facility, I had ample opportunity to observe what the defendant's real responsibilities were. They did not include the making of personnel policy or, except as authorized by NASA Headquarters, the making of pronouncements with respect to serious personnel management at MSFC. According to my consistent observations, the defendant was kept pretty much in

leading strings, so to speak, by NASA Headquarters. That was particularly true after Mr. Groo became Associate Administrator for Center Operations of NASA. Mr. Groo early made it clear to all of us who ate in the executive dining room that he would be calling the shots with respect to the formulation of policy for MSFC— as I am sure he did, also, with respect to other field centers of NASA.

"I speak without benefit, if that is the right word, of any inspection of the defendant's position record. It has been my personal experience and observation, while employed at MSFC, that there is not likely to be anything approaching congruency between position records and actual duties and responsibilities. Position records, by and large, are designed to conceal as much as they reveal."

Further, affiant saith not.

/s/ Leslie W. Ball
Affiant

Sworn to and subscribed before
me, this 1st day of November, 1976.

/s/ William H. Elrod, Jr.
Notary Public, State of Ala. at Large,
(My comm. exp. 2 Nov. 1976.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

• • • • • • •

[Title Omitted In Printing.]

COMES NOW the defendant in the above-styled cause and submits the attached affidavits of:

ELMER S. GROO
JAMES T. SHEPHERD, and
JOSEPH M. JONES,

in further support of his pending Motion for Summary Judgment.

WAYMAN G. SHERRER
United States Attorney

/s/ HENRY I. FROHSIN
Assistant United States
Attorney

[Certificate of Service omitted in printing.]

[Court & Title Omitted In Printing.]

AFFIDAVIT OF ELMER S. GROO FOR USE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Washington, D. C.)

Before the undersigned authority in and for Washington, D. C., this day personally appeared Elmer S. Groo who, being first duly sworn, did depose and say as follows:

I am now, and have been since September 4, 1974, the Associate Administrator for Center operations, National Aeronautics and Space Administration.

I have read and am familiar with the Plaintiff's complaint in this action and "Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment," which was filed on November 3, 1976, including the two affidavits attached to the latter.

Dr. James C. Fletcher, Administrator, National Aeronautics and Space Administration, announced the creation of the position of Associate Administrator for Center operations in a "Special Announcement" dated March 5, 1974 (copy attached). From that time until September 4, 1974, the effective date of my appointment, the position was filled by Dr. George M. Low, Deputy Administrator, on an "acting" basis.

As Associate Administrator for Center Operations, I am the "line official responsible for Agency-wide planning and direction of institutional resources and operational activities at the NASA field Centers." The following NASA offices report to me: The Directors of all NASA field installations; the Assistant Administrators for institutional management and personnel programs; and the Assistant Associate Administrator for system management. (See NASA Organization Chart approved March 29, 1976, copy attached). Thus I am responsible for institutional, personnel, and systems policies on an *agency-wide* basis, and not only for the various field centers.

Since appointment to my current position, I have made six visits to the Marshall Space Flight Center, the first one on September 23, 1974, just nineteen days after my appointment. The purpose of that visit was for me to be briefed about the functions and activities of the Center and to meet the Center's management officials. This is clearly evident from the agenda prepared by the Center (copy attached).

As indicated by the affiant Leslie W. Ball, I did have lunch with certain of the Center's management officials. However, his statement that I "made it clear" that I would be calling the shots with respect to the formulation of policy for MSFC" is completely erroneous. While I do not have a present recollection of everything that may have been said during that first visit, Dr. Ball's interpretation is totally implausible for at least two reasons: First, I never intended to operate—and have not

operated—in the manner implied by my alleged statement; and Second, even if I had intended to operate in such a manner, I would certainly not have made the announcement at an informal luncheon or in such a heavy-handed fashion.

The statement is also made by affiant Ball that the MSFC Center Director is "kept pretty much in leading strings" by NASA Headquarters, without authority to make Center personnel policy. In response to that, I need only summarize my view of the management relationship between the Center Director and me: I establish manpower targets and goals, and we jointly agree upon basic overall management guidelines. Within this framework, the Center Director is fully responsible—and has the correlative discretion and authority—for managing the Center's personnel policies and programs in accordance with the rules and regulations of the Civil Service System.

Further Deponent sayeth not.

/s/ Elmer S. Groo

Sworn to before me and subscribed in my presence this 23d day of November 1976.

/s/ Margaret F. Nelson
Notary Public
My commission expires
February 14, 1977

[Court & Title Omitted In Printing.]

AFFIDAVIT OF JAMES T. SHEPHERD FOR USE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF ALABAMA
MADISON COUNTY

Before the undersigned authority in and for said County in said State, this date personally appeared James T. Shepherd, who, being first duly sworn, did depose and say as follows:

I am now, and have been since January 1, 1974, the Director, Administration and Program Support, of the National Aeronautics and Space Administration's George C. Marshall Space Flight Center. Administration and Program Support is one of the three major operating directorates of the Center. See Center Organization Chart dated October 1, 1976 (copy attached).

I have read and am familiar with the Plaintiff's complaint in this action and "Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment," filed on November 3, 1976, including the two affidavits attached to the latter.

As Director of Administration and Program Support, I attended most of the meetings held at the Center on the occasion of Mr. Elmer S. Groo's first visit in September of 1974, including his luncheons with the Center Director's executive staff. I do not have a present recollection of everything that was said at those meetings. Specifically, I do not recall any statement by Mr. Groo, or anything he said which could reasonably have been construed, to the effect that he "would be calling the shots with respect to the formulation of policy for MSFC." If Mr. Groo had made any such statement in my presence, I am certain that I would recall it. As a key management official of this Center, I would have been highly sensitive to *any* statement that

this Center's management prerogatives were to be reduced or withdrawn to NASA Headquarters.

At the time of Mr. Groos' initial visit, Leslie W. Ball was Director of the Center's Safety Office. In that capacity, he also attended the Center Director's staff luncheons.

I attended most of the meetings held here on the occasions of Mr. Groo's subsequent visits to the Center. These visits occurred on July 8, 1975, November 5, 1975, and June 1, 1976. Dr. Ball did not attend these subsequent meetings, including the Executive Staff luncheons. As a result of the reduction in force held at the Center during March 1975, Dr. Ball was displaced from his position by another qualified Government employee with greater retention rights under the Civil Service laws and regulations. Thus, Dr. Ball is no longer a member of the Director's Executive Staff. He has appealed this action once to the Civil Service Commission and has indicated that he may appeal further.

Further Deponent sayeth not.

/s/ JAMES T. SHEPHERD

Sworn to and subscribed before me this 24th day of November, 1976.

/s/ Dorothy J. Davis
Notary Public

[Title Omitted In Printing.]

AFFIDAVIT OF JOSEPH M. JONES FOR USE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF ALABAMA
MADISON COUNTY

Before the undersigned authority in and for said County in said State, this date personally appeared Joseph M. Jones who, being first duly sworn, did depose and say as follows:

I am now, and have been since November 12, 1973, the Director of the Public Affairs Office of the National Aeronautics and Space Administration's George C. Marshall Space Flight Center.

I have read and am familiar with the plaintiff's complaint in this action and the "Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment," filed on November 3, 1976, including the two affidavits attached thereto.

In my capacity as Director of Public Affairs, I arranged for the press conference which was held by Dr. Lucas on June 25, 1973, in the Center's Headquarters' building. I was present with Dr. Lucas throughout that press conference.

As stated by the Affiant Barry J. Casebolt, my office did retain copies of the press release which was handed out at the press conference (copy attached). The matter of William C. Bush's public allegations critical of the Center was not covered in that release. However, my office had received informal press inquiries on that matter, and I believed it likely that reporters would ask questions on the subject during the press conference. I discussed this likelihood with Dr. Lucas prior to the con-

ference but did not undertake to prepare anything on the subject or to include that item in the press release.

The TV interview of Dr. Lucas occurred immediately at the end of the formal press conference, in area adjoining Dr. Lucas' seated position at the head of the table. To my knowledge, no member of the press had left when this interview started; certainly a majority of them was present. I would say the interview commenced within half a minute of the "formal" press conference, while other reporters were chatting, gathering equipment, and making preparations for departure.

During Mr. Casebolt's tenure with *The Huntsville Times,* first as a reporter, and later as Science Editor, I had frequent contacts with him. However, Mr. Casebolt is no longer employed by the newspaper. Dr. Lucas, Mr. Potate and I have been accused of having in some manner engineered Mr. Casebolt's dismissal from *The Huntsville Times.* Attached is a copy of a letter dated August 13, 1976, from Senator Proxmire which reflects that allegation, as well as a denial on our behalf dated September 20, 1976, from Mr. James C. Fletcher, NASA Administrator.

Further Deponent sayeth not.

/s/ JOSEPH M. JONES

Sworn to and subscribed before me this 23rd day of November, 1976.

/s/ Dorothy J. Davis
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

* * * * * * *

[Title Omitted In Printing.]

ORDER

For reasons set forth in the accompanying Memorandum of Opinion, the court concludes that defendant's motion for summary judgment is due to be granted. Accordingly, it is ORDERED, ADJUDGED and DECREED that, there being no genuine issues as to any material fact, summary judgment is hereby granted in favor of defendant William R. Lucas.

Costs to be taxed against plaintiff.

Done this the 4th day of February, 1977.

/s/ Sam C. Pointer, Jr.
United States District Judge

[Copy certification omitted in printing.]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

[Title Omitted In Printing.]

NOTICE OF APPEAL

Notice is hereby given that William C. Bush, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order granting defendant's motion for summary judgment in this action, which said order was rendered on or about 4 February 1977 and apparently was entered on or about 7 February 1977.

This 7th day of March, 1977.

/s/ Harvey Elrod
P. O. Box 632
Decatur, Alabama 35602
(Tel. No. [205] 355-3731)
Attorney for plaintiff-appellant

HUTSON, ELROD, EDWARDS & BELSER
Citizens Industrial Bank Bulding
205 Holly Street
Decatur, Alabama 35601
Of Counsel

Office - Supreme Court, U.S.
FILED
JUN 3 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-469

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH, PETITIONER

v.

WILLIAM R. LUCAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE RESPONDENT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-469

WILLIAM C. BUSH, PETITIONER

v.

WILLIAM R. LUCAS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MOTION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Pursuant to Rule 35.5 of the Rules of this Court, the Solicitor General, on behalf of respondent, respectfully moves for leave to file a supplemental brief to bring to the Court's attention the recent decision of the United States Court of Appeals for the Sixth Circuit in *Braun* v. *United States*, No. 81-1411 (May 27, 1983).[1]

Braun, like petitioner here, was a government employee who alleged that his supervisors retaliated against him for criticizing alleged government mismanagement. Specifically, Braun claimed that he was wrongfully denied a promotion and subjected to other unfavorable actions. In addition to suing the United States, Braun, like petitioner,

---

[1] We have lodged ten copies of the opinion in *Braun* with the Clerk of this Court and have served a copy on counsel for petitioner.

sought damages from his supervisors in their individual capacities, asserting that he had a cause of action under the First Amendment by virtue of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The Sixth Circuit, explicitly following the decision of the court of appeals in the present case, affirmed the district court's dismissal of the complaint, holding that Braun did "not state a *Bivens* cause of action * * * because there are alternative remedies available and because of the special relationship of [Braun] as a federal employee" to the government. Slip op. 9. The Sixth Circuit had not previously addressed this issue, and its decision continues the trend we noted in our principal brief (at 17 and note 6): no circuit has resolved the question presented by this case adversely to our position.[2]

For these reasons and the reasons stated in our principal brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

JUNE 1983

---

[2]The alternative remedies available to Braun apparently included remedies under the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 1101 *et seq.* See slip op. 2, 4-7. Because this Act was passed after the actions of which petitioner complains, its remedies were not available to petitioner; but as we explained in our principal brief (at 29-34), the remedies that existed before 1978 were also sufficient to preclude a *Bivens* action.

DOJ-1983-06

NO. 81-469-CFX | TITLE William C. BUSH, Petitioner
v.
William R. Lucas

DOCKETED	COURT
Sept. 4, 1981	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: William Harvey Elrod, Jr.
	Counsel for Respondent:
Sept. 4, 1981	Petition for writ of certiorari filed. (Record filed).
Sept. 4, 1981	Appendix filed.
Sept. 30, 1981	Order extending time to file a response to the petition until Nov. 8, 1981.
Nov. 6, 1981	Brief, amici curiae, of Public Employee Department, AFL-CIO and National Weather Service Employees Organization filed
Nov. 6, 1981	Order further extending time to file a response to the petition until Nov. 15, 1981.
Nov. 6, 1981	Brief, amicus curiae, for American Federation of Government Employees, AFL-CIO, in support of the petition filed.
Nov. 12, 1981	Brief for the respondent in opposition filed.
Nov. 18, 1981	DISTRIBUTED. 12-4.
Dec. 7, 1981	REDISTRIBUTED. 12-11.
Jan. 4, 1982	REDISTRIBUTED. 1-8.
June 22, 1982	REDISTRIBUTED. 6-24.
June 28, 1982	Petition GRANTED.

July 20, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until Sept. 11, 1982.
Sept. 10, 1982	Brief amici curiae of Representatives Patricia A. Schroeder, et al. in support of petitioner filed.
Sept. 10, 1982	Brief amicus curiae of National Treasury Employees Union in support of petitioner filed.
Sept. 11, 1982	Brief amicus curiae of The American Civil Liberties Union filed.
Sept. 14, 1982	Brief, amici curiae, of The American Federation of Labor and Congress of Industrial Organizations, et al. filed.
Sept. 13, 1982	Order extending time to file the joint appendix and the petitioner's brief on the merits until Sept. 14, 1982.
Sept. 16, 1982	Joint appendix filed.
Sept. 16, 1982	Brief for the petitioner filed.
Oct. 19, 1982	Order extending time to file the respondent's brief on the merits until Nov. 19, 1982.
	(Over).

81-469

Title

No.

DATE	PROCEEDINGS AND ORDERS
Nov. 23, 1932	Order further extending time to file the respondent's brief on the merits until Nov. 26, 1982.
Dec. 3, 1982	Brief for the respondent filed.
Jan. 11, 1983.	Reply brief for the petitioner filed. (D).
Jan. 19, 1983	ARGUED.
June 3, 1983	Motion of the Solicitor General for leave to file supplemental brief after argument filed.
June 6, 1983	DISTRIBUTED. June 9, 1983. (Above motion).
June 13, 1983	The motion of respondent for leave to file a supplemental brief after argument is granted.
June 13, 1983	Adjuded to be AFFIRMED. Concurring opinion by Marshall, J., with whom Blackmun, J., joins.